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IN THE

Supreme Court of the United States

OCTOBER, 1985

NO.

WILLIAM WILLIS,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

David B. Byrne, Jr.
John M. Bolton, III
Attorneys for Petitioner
P. O. Drawer 1470
Montgomery, Alabama 36102

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

William Willis, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-styled case on April 23, 1985.

QUESTIONS PRESENTED

I

Whether the Circuit Court improperly redetermined the time of the defendant's arrest as made by the District Court without a finding that such initial determination was clearly erroneous.

II

Whether there existed probable cause to arrest this defendant consistent with the Fourth Amendment and the prior decisions of this Court.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is printed in Appendix A hereto, *infra*. The judgment of the United States Court of Appeals for the Eleventh Circuit is printed in Appendix A herto, *infra*. The memorandum opinion on the defendant's motion to suppress rendered by the United States District Court for the Middle District of Alabama is printed in Appendix B hereto, *infra*.

JURISDICTION

The judgement of the United States Court of Appeals for the Eleventh Circuit (Appendix A, *infra*) was entered on April 23, 1985. The jurisdiction of the Supreme Court is invoked under Rule 17.1, Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

I.

Constitution of the United States, Amendment IV

"[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause ..."

II.

Constitution of the United States, Amendment V

"[n]o person ... shall be compelled in any criminal case to be a witness against himself ..."

STATEMENT OF THE CASE

In the early morning hours of August 4, 1983, the defendant, William Willis, was arrested several miles from Dannelly Field, the municipal airport in Montgomery, Alabama. The defendant was subsequently charged, along with six other individuals, in a four-count indictment alleging violations of 21 U.S.C. §§ 952(a), 963, 841(a) (1) nd 846 for possession and importation of cocaine and conspiracy.

A hearing on the defendant's motion to suppress was held on September 21-23, 1983. The District Court on October 7, 1983, entered its order suppressing, *inter alia*, the defendant's statements to Montgomery Police Sergeant Brown prior to the time he was taken to the Howard Johnson's motel. On October 19, 1983, the defendants were convicted on all four counts charged in the indictment. The defendant's motions for judgment acquittal and for a new trial were denied.

On November 21, 1983, the defendant Willis was sentenced to the custody of the Attorney General for a total term of imprisonment of twenty-four (24) years, a total fine of $50,000.00 and a total special parole term of seven (7) years.

The events leading up to the arrest of the defendant Willis began with the landing of a twin engine Piper Navajo aircraft at Dannelly Field in Montgomery, Alabama, at approximately 9:40 P.M. on the evening of August 3, 1983. Ken Moseley and Todd Stettler, employees of the local fixed-base operator, Montgomery Aviation, attempted to direct the aircraft to a lighted area near the hanger. Instead, the plane was parked in a darkened area of the ramp across from the terminal, adjacent to where the fuel trucks were located. The plane was about one hundred forty yards from the hanger/office, and about seventy-five yards from the fuel pumps.

The employees observed a white male exit the plan by way of an access door on the side of the plane normally occupied by the pilot. He walked toward the employees, meeting them about half-

way between the aircraft and the Montgomery Aviation office. Moseley also observed a black male walking toward the Montgomery Aviation office.

The white male approached Moseley and asked him where he could find a telephone. Moseley directed him inside the terminal building. Moseley was asked for a good place to stay and he mentioned the Holiday Inn near the airport. The white male told Moseley that someone would be coming back later that evening to unload the aircraft and that he should not be concerned.

Three or four minutes later, the black male walked into the office and gave Stettler a fuel order. Stettler asked him for his name, the owner and the mailing address in order to complete the line slip. The black male told Stettler the type of fuel he wanted, which tanks to fill, and the tail number of the aircraft. The black male filled out the line slip, writing, "Ron Allen, CIB Auto, Nashville, Tennessee".

Stettler and Moseley proceeded to the plane to fuel it. One of them got up on the aircraft wing in order to wash the windows of the plane. Peering through the window, Moseley observed duffle bags and a life raft inside the plane. The tail was sitting down and the front strut was extended. They became suspicious. Stettler told Moseley that they had better not fuel the aircrft. Instead, they called airport security.

Airport Security Officer Robert Samuel Hatter arrived at 10:00 P.M. Moseley and Stettler described to the officer the two individuals that had departed. The black male was described as approximately six feet tall, wearing shorts and an "Alabama" t-shirt. The white male was described as approximately six feet tall, thirty years old and wearing a white t-shirt with red sleeves and cut-off shorts.

Dick Newman, the employees' supervisor, contacted the state police, who in turn notified the Alabama Bureau of Investigation, Narcotics Division. Eventually, Montgomery City Policemen, and agents from the Alabama Bureau of Investigation, Alabama

Department of Public Safety, and Federal Drug Enforcement Agency arrived on the scene.

Tyrone Anderson, an agent with ABI, arrived at Montgomery Aviation at about 10:25 and interviewed Stettler. Anderson looked in the one window of the plane which was not covered with a curtain. The plane appeared to contain duffle bags. Anderson later testified that the lighting conditions around the plane were very poor, except for some police car headlights focused on the plane.

By this time, Stettler had completed his shift and left the airport to drive home. On the highway, he passed the black male whom he had observed near the plane, walking down the road. Stettler then returned to Montgomery Aviation and told a state trooper that one of the pilots was walking down Highway 80. Trooper Dixon asked Stettler to get into the car with him, Moseley and Anderson, and all four proceeded to the highway. The individual previously seen was not observed on the highway. The trooper returned to the terminal. Moseley and Anderson went inside the terminal, while Stettler and Dixon went back toward the highway. At that point, Stettler saw the black male standing near the exit of the public parking lot. Omar Mahdi was picked up at 10:35 P.M. and placed in the back of the Trooper vehicle.

A few minutes later Assistant Commander of the ABI Narcotics Squad, L. N. Bradford, and two investigators, James Ward and William Rhegness, arrived on the scene. They were briefed and Bradford communicated the status of the investigation to other investigating agencies in the area. A description of the white male was broadcast between 10:50 and 11:00 P.M. Rhegness and Ward were dispatched to check motels for any persons having checked in within the past hour.

Bradford then spoke with Sgt. Randall Brown of the Montgomery Police Department, who offered his agency's assistance. Brown arrived at Montgomery Aviation about 11:30 or 11:40 P.M. He was advised of the events up to that time. He was told that a

black male had been picked up on the highway. The white male was described to him as thirty-two or thirty-three years of age, brown hair, approximately six feet tall and wearing a white t-shirt with red trim, jeans and tennis shoes. Bradford asked Brown to have the city police notify the cab companies to see if they might have picked up a fare from the airport within the last hour, and to determine their destination.

Brown called his office from inside the Montgomery Aviation office. He was positioned at a counter where he could see through the glass front of the office. While talking on the phone, a yellow cab pulled just inside the gate of Montgomery Aviation. A white male got out of the cab, looked in the direction of the plane, glanced over to the inside of the building where Brown was, and got back into the taxicab. The taxi backed up and left. Brown got off the phone and followed in his own car. Brown stated that the appearance of the white male who exited the cab basically fit the description of the white male who was seen leaving the aircraft. However, the white male in the cab was wearing a dark shirt, and *had a full beard.* Brown had received no description for a white male wearing a dark shirt with a beard.

Brown radioed for a marked police car to stop the taxicab. After the cab was stopped by the marked unit about four miles from the airport, Brown arrived on the scene. The taxi driver got out of his cab and walked toward Brown. Brown identified himself and told him he wanted to ask him some questions. In response to a question, the cab driver, Tommy Smith, stated that he picked up his fare at the Howard Johnson's and took the passenger to Dannelly Field. Brown testified that the cab driver said that his fare asked him about an incoming flight and the cab driver informed him that there was a Delta flight coming in at 12:01 A.M. Brown stated that Smith told him that he first took the fare to the main terminal at the airport. Smith testified that after waiting in front of the baggage claim exit at the municipal airport terminal, the fare asked Smith if there was any other place to meet a plane. Smith told him about Montgomery Aviation. At Montgomery Aviation, the passenger stepped from the cab and told the driver

to wait for him. Smith did not observe an aircraft with automobile lights illuminating it or any police vehicles. Moments later, he got back into the cab, and stated to the driver that he wanted to go back to the motel because he was hungry.

Brown asked Smith if he could speak with his passenger. At 12:10 A.M., Brown approached the cab, with his right hand on his service revolver. With his free hand he knocked on the car window, telling the passenger to get out of the cab. Brown identified himself and patted down the suspect. He asked him for identification. The fare handed over his Kentucky drivers' license with the name William Willis. Brown took the license and advised Willis that there was a problem at the airport and that Brown needed to find out his purpose for being at Montgomery Aviation at that time. Willis said that he had gone to Montgomery Aviation to pick up a friend coming from Nashville at midnight. Willis stated that his friend's name was John Johnson, but then he changed it to John Jamison. Brown asked Willis where he was staying and Willis stated that he was staying at Howard Johnson's. Willis was asked how long he had been in town and Willis stated that he had arrived about forty to forty-five minutes earlier. He said that he and his friends were en route to Mobile to play golf.

Officers Rhegness and Ward arrived on the scene at 12:30 A.M. Another police unit arrived. There were at least five law enforcement officers present. Rhegness walked over to where Willis was standing outside the cab. He made some notes from Willis' drivers' license and advised Willis of his rights. Rhegness retained Willis' license. He then asked Willis what his business was in Montgomery. Willis responded that he was an independent coal broker, and had come to Montgomery alone on business. Willis said he did not come to Montgomery with anybody, but he had plans to play a golf tournament. Rhegness asked Willis if he would mind staying with Brown while Rhegness and Ward went to the Howard Johnson's to check out his story.

Ward and Rhegness then went to the Howard Johnson's Motel and entered the lobby. Elizabeth Lincoln, an auditor and night clerk, was on duty. She let them into the office through the locked

side door. Ms. Lincoln was shown their credentials and they inquired as to whether a William Willis was, in fact, registered at the motel. In order to determine whether or not Willis had actually registered, Lincoln was requested to examine her records. Once she located the records, the police officers asked if they could inspect them.

Lincoln stated that Willis had checked in at 11:19 P.M., and rented three double rooms, Rooms 220, 222, and 224. She stated that he paid cash for the rooms, and that there was a long-distance phone call placed from Room 222.

One of the agents asked Ms. Lincoln if she had seen a young man in a red and white t-shirt that night. She responded that she had not, and had just come on duty. After Ms. Lincoln showed the long-distance telephone card to the officers, a young man entered the door and asked for change. She had never seen this man before. While she was getting change, she noted the colors of his shirt were red and white. She turned around to look again, and observed that the young man was wearing a red, white and blue shirt. She asked him if he was a registered guest at the motel, and he said "yes". She asked him what room he was in and he showed her the key to room 220.

Ms Lincoln glanced at one of the agents and he looked at his partner. The officers took out their badges and showed their credentials to the person in the red and white t-shirt. Rhegness felt that the man matched the description of the white pilot. They asked the subject for identification, and he produced a drivers' license in the name of David Joseph Newcomb. Rhegness asked him if he was registered at the hotel and Newcomb produced a key to room 220. Rhegness testified that he advised Newcomb of his rights at this point. Newcomb stated that he had driven to Montgomery with some friends in a vehicle from Ft. Lauderdale, but could not remember their names. He stated that he did not know William Willis. He aiso told the officers that he was an unemployed aircraft salesman and a licensed pilot.

After speaking with Newcomb, Ward left the lobby area in

order to radio Brown to bring Willis to the motel. While outside, he observed two white males coming from the direction of the restaurant. He walked up to them and asked if they were staying at the motel. Ronald DeFranco produced a key to room 224. Both DeFranco and Harry Dale Ziegler, the other individual, said they were staying in room 224. Ward asked them to step into the office, about ten steps away. Once inside the office, Ward advised Newcomb, DeFranco, and Ziegler of their rights. Newcomb, DeFranco and Ziegler were told to empty their pockets onto the counter.

Meanwhile, Sgt. Brown still detained Willis on the side of the highway. Brown received a radio dispatch advising him that Ward and Rhegness wanted him to proceed to the Howard Johnson's with Willis. He advised Willis that he could ride with him and suggested that he should take care of his cab fare. Willis had been detained *for about one hour.*

Upon arriving at the Howard Johnson's, Brown and Willis went into the lobby. Ward asked Willis if he knew the other persons, and Willis said that he did.

Minutes later, at 1:10 A.M., Charles Park, a Drug Enforcement Administration Agent, arrived on the scene. Rhegness, Ward and Brown related to him the status of the investigation up to that point. Park went into the lobby of the motel. Each arrestee's personal property was on the counter. He took their drivers' licenses and returned their other personal property. He advised them of their rights and spoke with each one individually. Park told them that they were under arrest and the nature of the charge.

Significantly, in its written opinion filed in the suppression hearing, the District Court concluded that Willis was arrested once the taxicab was first stopped.

> Willis' arrest does, however, present Fifth Amendment problems. *As an initial matter, the Court does not agree with the government's contention that Willis was not in custody when the cab was stopped and Willis was asked*

> *to get out. As the Court has stated, probable cause for taking Willis in custody existed. Although Brown testified that Willis was free to leave, the Court believes the facts indicate that Brown intended to hold Willis, and also that Willis would not reasonably have believed that he could leave. Once the police stopped the cab, Willis had no means of leaving.* Furthermore, Brown appears to have held Willis' drivers license for a brief time, although the evidence shows that he returned it before Rhegness and Ward arrived. (Citation ommitted). Finally, Brown testified that he believed Willis to be connected to the plane which also shows that the investigation had focused on Willis. (Emphasis added).

On appeal, the Eleventh Circuit disregarded the District Court's opinion concerning the time of arrest. Instead, the Circuit Court concluded that Willis was not arrested until the police told Willis to empty the contents of his pockets at the motel, almost an hour after the taxicab was first stopped.

The Eleventh Circuit affirmed Willis' conviction on April 23, 1985, and his petition for rehearing was denied on June 4, 1985.

REASONS FOR GRANTING WRIT

The decision of the Court of Appeals for the Eleventh Circuit regarding the defendant's arrest is not consistent with previous decisions of this Court. Moreover, the Eleventh Circuit's decision redetermining the time of the defendant's arrest, without a finding that the opinion of the District Court was clearly erroneous, is contrary to the law of the Second, Fourth, Fifth, Seventh, Eighth and Ninth Circuits, as well as previous decisions of the Eleventh Circuit.

In order to avoid the issue of the defendant's lengthy detention and circumvent the Fourth Amendment requirement of probable cause, the Eleventh Circuit's opinion in *United States v. Willis*, 759 F.2d 1486 (11th Cir. 1985), reverses, without expressly stating

so, the District Court's finding regarding time of arrest and seeks to rest its opinion upon an extension of *United States v. Sharpe*, _____ U.S. _____, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985) and the rationale of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Without any indication of its intent to overrule the trial court, the Eleventh Circuit substituted its judgment for that of the District Court regarding the time of the defendant's arrest and justified Willis' initial seizure and detention under a *Terry*-stop analysis. This was clearly an effort by the Circuit Court to avoid the defendant's issue of probable cause to arrest properly preserved below.

A clear majority of the circuits hold that a District Court's findings of fact on a motion to suppress must be accepted by an appellate court unless clearly erroneous. *United States v. Briley*, 726 F.2d 1301 (8th Cir. 1984); *United States v. Caicedo-Guarnizo*, 723 F.2d 1420 (9th Cir. 1984); *United States v. Chevals*, 741 F.2d 1346 (11th Cir. 1984); *United States v. Newbern*, 731 F.2d 744 (11th Cir. 1984); *United States v. Gomez-Diaz*, 712 F.2d 949 (5th Cir. 1983); *United States v. Black*, 675 F.2d 129 (7th Cir. 1982); *United States v. Buettner-Janusch*, 646 F.2d 759 (2nd Cir. 1981); *United States v. Jonas*, 639 F. 2d 200 (5th Cir. Unit B 1981); *United States v. Duckett*, 583 F.2d 1309, 1313 (5th Cir. 1980); *United States v. Coker*, 599 F.2d 950 (10th Cir. 1979); *United States v. Jackson*, 585 F.2d 653 (4th Cir. 1978). Nor may the Appellate Court substitute its judgment of the facts for that of the District Court. *United States v. Hatfield*, 599 F.2d 759 (6th Cir. 1979).

The District Court's Memorandum Opinion filed October 13, 1983, read in pertinent part as follows:

> Willis' arrest does, however, present Fifth Amendment problems. *As an initial matter, the Court does not agree with the Government's contention that Willis was not in custody when the cab was stopped and Willis was asked to get out.* As the court has stated, probable cause for taking Willis in custody existed. Although Brown testified that Willis was free to leave, the court believes the facts

> indicate that Brown intended to hold Willis, and without that, Willis could not reasonably have believed that he could not leave. Once the police stopped the cab, Willis had no means of leaving. Furthermore, Brown appears to have held Willis' drivers license for at least a brief time, although the evidence shows that he returned it before Rhegness and Ward arrived. ... Finally, Brown testified that he believed Willis to be connected to the plane, which also shows that the investigation had focused on Willis. (Emphasis added).

Because of the absence of probable cause upon which to base an arrest, the Eleventh Circuit concluded "that the police did not arrest Willis until they told him to empty his pockets [at the motel]". *Willis, supra* at 1497. The difference between the District Court findings that arrest had occurred at approximately 12:10 A.M. and the Eleventh Circuit's opinion that arrest had occurred at approximately 1:05 A.M., some fifty-five minutes later, is of critical significance in evaluating the Fourth and Fifth Amendment issues raised by this defendant.

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of a traditional arrest. *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); *Terry, supra*. Indeed, whenever a police officer accosts an individual and restrains his freedom to walk away, he has effectively seized that person and that seizure must be reasonable under the Fourth Amendment. *Terry, supra*. The reasonableness of the seizure depends upon a balance between the public interest and the individual's right to personal security free from arbitrary interference by law enforcement officers. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). *Terry, supra*, recognized a "narrowly drawn" exception to the probable cause requirement of the Fourth Amendment for certain seizures of the person that do not rise to the level of full arrest. Two major justifications supported this major development in Fourth Amendment jurisprudence. First, a legitimate *Terry* stop – brief and narrowly circumscribed – was said to involve "a wholly different kind of intrusion upon in-

dividual freedom" than a traditional arrest. *Terry, supra* at 909. Secondly, under certain circumstances, the Government's interest in preventing imminent criminal activity could be substantial enough to outweigh the still-serious privacy interest implicated by a limited *Terry* stop. *Terry, supra* at 909. Thus, when the intrusion on the individual is minimal and when law enforcement interests outweigh the privacy interest infringed by a *Terry* encounter, a stop based upon objectively reasonable and articulable suspicions, rather than upon probable cause, is consistent with the Fourth Amendment.

However, it is also clear, that an investigative detention under *Terry* must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed. 2d 229 (1983). Although this Court has disdained the use of a "bright line" test for detemining the length of an investigative detention. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), clearly anticipated only a brief detention:

> The investigative stops usually consumed less than a minute and involved "a brief question or two". *Dunaway, supra* at 834-35 quoting *United States v. Brignoni-Ponce*, 442 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

See also Royer, supra; United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (Ninety minute detention of defendant's luggage made his seizure unreasonable without probable cause); *United States v. Chamberlin*, 644 F.2d 1262 (9th Cir. 1980) (Twenty minute detention of individual in parked car, on the basis of a reasonable suspicion that criminality was afoot, but without probable cause was unlawful); *United States v. Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979) (three hour detention at Border checkpoint station, including two and one-half hour delay pending arrival of DEA agents, following valid investigatory field stop of vehicle, constituted illegal arrest); *United States v. Miller*, 546 F.2d 251 (8th cir. 1976) (frisk for weapons following ten to fifteen minute house search pursuant to valid search warrant not

valid under *Terry*, because individual was detained longer than necessary); cf. *United States v. Vasquez-Santiago*, 602 F.2d 1069 (2nd Cir. 1969), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2998, 64 L.Ed.2d 861 (1980) (Brief detention of individual at airport on basis of reasonable suspicion of narcotics violation was not an unconstitutional intrusion, the detention involving only a couple of minutes of questioning).

It is thus axiomatic that a citizen may not be detained, even momentarily, without reasonable, objective grounds for doing so. Moreover, his refusal to listen or to answer questions does not, without more, furnish those grounds. *Royer, supra.*

The Supreme Court has further instructed that detentions may still violate the Fourth Amendment although presented under the guise of an "investigatory stop":

> Detentions may be "investigative" yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. *Nor may the police seek to verify their suspicions by means that approach the conditions of arrest. Dunaway v. New York, supra*, at 60 L.Ed.2d 840 made this clear. There, the suspect was taken to the police station from his home and, without being formally arrested, interrogated for an hour. The resulting incriminating statements were held inadmissible: reasonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative.
> *Royer, supra* at 237. (Emphasis added).

Fourth Amendment safeguards are triggered when there is a show of official authority such that a reasonable person would have believed that he was not free to leave. *Royer, supra; United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

In the instant case, Officer Brown stopped the taxicab at 12:10 A.M. The police officer placed his hand on his gun, removed the

defendant from the cab, searched his person, secured his Kentucky drivers license and then began his questioning. The license was never returned to the defendant. Willis contends, as the District Court found, that this conduct alone transformed the encounter into a seizure protected by the Fourth Amendment.

The Eleventh Circuit concluded, however, that:

> The initial stop of the cab and questioning of Smith did not amount to a seizure because a reasonable, innocent passenger in a cab pulled over by the police would assume that a traffic violation or other conduct by the driver was the cause of the stop. No ordinary person would conclude from this that he was not free to leave the scene. The inconvenience of waiting a few minutes while police talked with the driver, or even the short walk to the motel, did not pose such significant limitations on Willis' freedom of movement as to constitute a seizure.
>
> * * *
>
> Having decided that in seizing Willis the police acted upon a reasonable suspicion, we next turn to the time of Willis' arrest. Applying the principals enunciated in *Dunaway v. New York, supra*, we hold that when the police told Willis to empty the contents of his pockets on the motel counter, they so intruded on him as to effect an arrest requiring probable cause.
>
> * * *
>
> Although police delayed Willis' return to his motel by twenty-five minutes, we cannot regard their asking him to remain at the point where he was stopped an arrest.

The defendant respectfully suggests that the Eleventh Circuit's opinion suggests a factual basis for the defendant's detention which is *de hors* the Record. Footnote 2 of the opinion, for instance, justifies the "patdown for weapons on the basis that approaching the unindentified occupant of a car on a relatively isolated highway and late at night was potentially dangerous."

Willis, supra at 1496. In fact, as the Record reflects, the stop of the taxicab occurred on the Southern By-Pass, "a few hundred" yards East of the intersection of the Southern By-Pass and Highway 80. Contrary to the opinion's reference to an "isolated highway" the Southern By-Pass is the most heavily commercialized and frequently traveled thoroughfare in the city of Montgomery, day or night. Moreover, Willis' arrival *two hours* after the plane had landed, in a taxicab certainly does not fit the Government's "profile" of a member of an off-loading team. Rather, the conduct of Willis in arriving at the municipal airport or a local fixed-base operator in public transportation is entirely consistent with innocent behavior. As stated below, Willis never attempted to flee or exhibited any evidence of furtive conduct. Finally, the length of the detention, "approximately one hour", coupled with the officer's retention of the defendant's drivers license, caused this stop to mature into a *de facto* arrest as found by the District Court below.

Terry and its progeny only authorize the minimum intrusion of a brief, temporary stop and inquiry reasonably related in scope to the justification for their initiation. *Brignoni-Ponce, supra.* In *supra.* In *Adams v. Williams,* 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), the Supreme Court described the kind of stop that may be made if supported by reasonable suspicion:

> A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officers known at the time.

The conduct of Officer Brown clearly exceeded the length and bounds of a *Terry*-type detention. Indeed, the Circuit Court's opinion flies directly into the face of the Eleventh Circuit's own decisions in *United States v. Elsoffer,* 671 F.2d. 1294 (11th Cir. 1982) and *United States v. Robinson,* 690 F.2d. 869 (11th Cir. 1982). *See also, United States v. Berry,* 670 F.2d 603 (11th Cir. 1982).

Turning to the validity of the seizure, the Government cannot escape the test of probable cause. Probable cause exists only where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Elsoffer, supra* at 1298. The conduct of a citizen in securing public transportation to the municipal airport or the local fixed-base operator, Montgomery Aviation, is entirely consistent with innocent behavior. Indeed, the cab driver described Willis' actions throughout as normal and routine. There was no attempt to flee nor any furtive gestures observed by Mr. Smith. There was absolutely no objective reason for Officer Brown to believe that Willis had committed a crime or was in the process of committing a crime.

In the present case, Officer Brown only knew that a twin-engine plane had landed at Montgomery Aviation at approximately 9:40 p.m. loaded with duffel bags. Two males had been seen leaving the aircraft, one black and one white. The white male had been described to him as being in his early thirties, six feet tall, wearing blue jeans and a white tee shirt with red trim.

Officer Brown testified that he observed an individual exit a cab at Montgomery Aviation and "look around". The Government would have this Court believe that Brown reasonably suspected Willis to be the white male fitting the description he had been furnished of the individual seen leaving the plane over two hours earlier. Apart from the obvious difference in height and dress, Brown could not explain the existence of Willis' full beard.

SERGEANT BROWN: He had, however, on at that time a dark shirt and didn't exactly match the description of the white shirt; but having arrived in a taxi, the only way I could find out would be to maybe stop him and find out.

This is merely an after-the-fact attempt by the Government to justify the defendant's detention based upon the officer's hunch. While this clearly falls short of probable cause, it is also insufficient to support a Fourth Amendment seizure even under the reasonable suspicion test of an investigative stop:

> The inarticulate hunch, the awareness of something unusual, is reason enough for officers to look sharp. Their knowledge and experience identify many incidents in the course of a day that an untrained eye might pass without any suspicion whatever. But awareness of the unusual, and a proper resolve to keep a sharp eye, is not the same as an articulated suspicion of criminal conduct. *United States v. Montgomery*, 561 F.2d 875, 879 (D.C. Cir. 1977);

See also Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *United States v. Rias*, 524 F.2d 118, 121 (5th Cir. 1975).

Even accepting Officer Brown's rendition of the facts, the taking of Willis' driver's license and the detention of the defendant for approximately an hour transcends even the limits of *Terry*. Moreover, nothing further occurred in the course of that hour which provided the requisite probable cause to support the arrest of this defendant. Accordingly, based upon the foregoing, the stop and detention of Willis in a taxicab four to five miles from the airport cannot be supported under either a *Terry*-type or full arrest analysis. As a result, the fruits of his unlawful detention are tainted within the meaning of the Fourth Amendment and must be suppressed. *Taylor v. Alabama*, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982). Even the *Miranda* warnings given subsequently at the motel or arguably given by ABI Agent Ward at the scene cannot overcome the taint of an illegal arrest. *Robinson, supra.*

The Eleventh Circuit's opinion also seeks to rely upon the recent decision of the Supreme Court in *Sharpe, supra. Sharpe* is both factually and legally distinguishable from this case. The relevant facts of *Sharpe* may be summarized as follows:

(a) DEA Agent Cook was on patrol in an unmarked vehicle on a coastal road near Sunset Beach, North Carolina.

(b) The DEA agent noticed a blue pickup truck and a Pontiac automobile traveling in tandem. The camper truck was riding low in the rear; the windows were covered.

(c) The pickup truck and the Pontiac turned off the main highway onto a campground road and proceeded at fifty-five to sixty miles an hour, more than twenty-five miles an hour over the speed limit.

(d) When the agent sought to stop the two vehicles, the pickup truck cut between the Pontiac and the patrol car and fled down the highway.

In this case, the stop occurred *not* on an isolated road, but on the heavily traveled Southern By-Pass, a few hundred yards East of the intersection of Highway 80 and the Southern By-Pass. The Eleventh Circuit's opinion also refers to Willis' "startled turn". However, the Record consistently refutes any contention of furtive conduct. Brown testified that when Willis re-entered the cab, the cab backed out and left the area in front of Montgomery Aviation and proceeded at a normal rate of speed as it departed the parking lot of Montgomery Aviation. Once Officer Brown caught up to the vehicle on U.S. 80, the cab was traveling within the speed limit. In fact, Brown affirmatively denies seeing the cab attempt any evasive meneuvers. In *Sharpe*, to the contrary, the length of the defendant's detention (approximately twenty minutes) was largely the product of his own efforts to escape the officers and avoid apprehension. Absent such conduct, the length of the stop would have been only momentary as envisioned by *Terry*. Certainly, it cannot be asserted that the length of Willis' detention was in any way the result of his own actions. In this case Willis' detention was extended by more than twice the time permitted in *Sharpe*.

CONCLUSION

Accordingly, in order to circumvent the issue of the defendant's lengthy detention, the Circuit Court's opinion which effectively reverses the District Court's finding regarding time of arrest, without a determination that such finding was clearly erroneous, requires this Court to hear the Defendant's petition and reach the question of probable cause.

William Willis submits that upon final determination of this cause the conviction of the petitioner in the United States District Court for the Middle District of Alabama should be reversed in that:

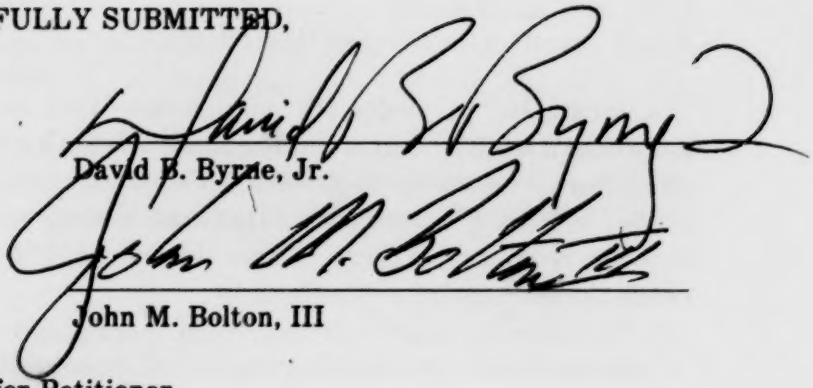
(a) A split of authority exists between the Eleventh and the Second, Fourth, Fifth, Seventh, Eighth and Ninth Circuits' treatment of a District Court's findings of fact on a motion to suppress;

(b) This conflict is due to be resolved by the Supreme Court in a manner establishing a standard procedure for disposing of similar circumstances and to provide guidance to other courts;

(c) That the opinion of the Eleventh Circuit regarding the defendant's arrest is clearly contrary to previous decisions of this Court.

For the reasons set forth hereinabove, petitioner respectfully requests this Court to grant his Petition for Writ of Certiorari in order that the issues may be fully briefed and decision in favor of petitioner ultimately reached.

RESPECTFULLY SUBMITTED,



David B. Byrne, Jr.

John M. Bolton, III

Attorneys for Petitioner
P. O. Drawer 1470
Montgomery, Alabama 36102

DATED: August 1, 1985

CERTIFICATE OF SERVICE

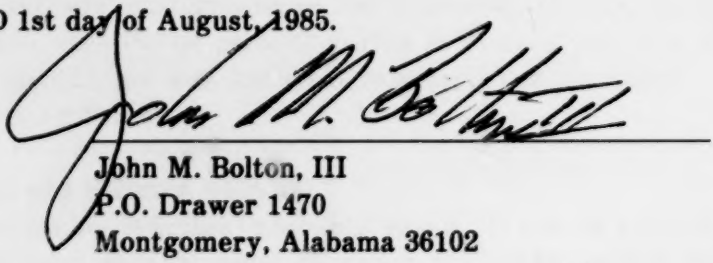
I, John M. Bolton, III, a member of the bar of the Supreme Court of the United States and counsel of record for William Willis, Petitioner herein, hereby certify that on August 1, 1985, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On the Solicitor General, Department of Justice, Washington, D. C. 20530, by depositing such copies in the United States Post Office, Montgomery, Alabama, first class postage prepaid, properly addressed to the post office address of the Solicitor General, Washington, D. C. 20530.

On the Honorable John Bell, United States Attorney for the Middle District of Alabama, Federal Building, Montgomery, Alabama 36104, by depositing such copies in the United States Post Office, Montgomery, Alabama, first class postage prepaid, properly addressed, to the post office address of the United States Attorney, the above-named counsel of record, at the Federal Building, Montgomery, Alabama 36104.

All parties required to be served have been served.

DATED 1st day of August, 1985.



John M. Bolton, III
P.O. Drawer 1470
Montgomery, Alabama 36102

APPENDIX A

ELEVENTH CIRCUIT OPINION AND JUDGMENT

UNITED STATES of America,
Plaintiff-Appellee,

v.

William WILLIS, a/k/a William Benton Ziegler, Omar Ashad Mahdi,
Defendants-Appellants.

No. 83-7651.

United States Court of Appeals
Eleventh Circuit.

April 23, 1985.

Defendants were convicted after jury trial in the United States District Court for the Middle District of Alabama, Truman M. Hobbs, Chief Judge, of conspiring to import, importing, possessing and possessing with intent to distribute cocaine, and defendants appealed. The Court of Appeals, Albert J. Henderson, Circuit Judge, held that: (1) police had probable cause to believe that airplane was involved in ongoing crime; (2) arrests of defendants were with probable cause; (3) defendants lacked standing to challenge officers' examination of motel records; (4) defendants waived their right to be present during individual voir dire of jury; and (5) evidence was sufficient to establish importation.

Judgments affirmed.

1. Searches and Seizures ⇐ 3.3(2)

In determining whether probable cause to search existed, reviewing court may examine collective knowledge of law enforcement officers if they maintain at least minimal level of communication during their investigation.

2. Arrest ⇐ 63.4(11)
Drugs and Narcotics ⇐ 182

Level of communication among investigating officers was more

than enough to aggregate officers' knowledge at any given moment, for purposes of determining probable cause to search airplane which contained cocaine and to arrest defendants, where officers of Alabama Bureau of Investigation, state troopers, and Montgomery police department communicated by radio and telephone concerning their investigations of defendants.

3. Drugs and Narcotics ⇐ 182

Probable cause to believe that airplane was connected with illegal activity was established, where pilot ignored lineman's plainly visible signals to stop at convenient, well-lighted space and halted instead in remote dark spot on far end of ramp, over 100 yards from office, tightly closed curtains on plane evinced suspicious intent to conceal contents of visibly heavily loaded plane, stuffed duffle bags in passenger seats of luxury passenger plane strongly suggested drug smuggling, and occupants disappeared after leaving incomplete directions for servicing plane.

4. Arrest ⇐ 63.5(1)

Stops of restricted investigative scope when conducted in noncoercive manner do not trigger Fourth Amendment protection. U.S.C.A. Const. Amend. 4.

5. Arrest ⇐ 63.5(7)

Stop becomes seizure when, under all circumstances of intrusion, reasonable, ordinary person in suspect's position would believe he is not free to leave. U.S.C.A. Const. Amend. 4.

6. Searches and Seizures ⇐ 7(1)

Fourth Amendment permits seizures only when supported by reasonable suspicion based upon specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. U.S.C.A. Const. Amend. 4.

7. Arrest ⇐ 63.4(1)

Intrusion so much greater than seizure as to be indistinguishable from arrest must be supported by probable cause.

8. Arrest ⇐ 68(3)

State trooper "arrested" defendant when he stopped defendant, asked for his identification, and placed defendant in back of police car to be transported for questioning.

9. Arrest ⇐ 63.4(1)

Arrest of defendant was constitutional where at time of arrest police had probable cause to believe defendant was connected with aircraft, and that aircraft was involved in ongoing criminal activity, very likely the importation of cocaine.

10. Arrest ⇐ 68(4)

Initial stop of taxi cab and questioning of taxi driver did not amount to seizure of defendant, who was passenger in cab, inasmuch as reasonable, innocent passenger in cab pulled over by police would assume traffic violation or other conduct by driver was cause of stop; however, when passenger learned that police were actually interested in him rather than driver, he was effectively "seized."

11. Arrest ⇐ 63.5(5)

Police had specific, articulable grounds for reasonably suspecting defendants' involvement with plane suspected of being involved in importation of cocaine so as to warrant investigatory stop, where enormous size and consequent value of suspected cocaine shipment suggested large conspiracy was in operation and that other conspirators were unlikely to leave valuable shipment unattended for long, and defendant had arrived at virtually empty ramp of airport at midnight.

12. Arrest ⇐ 68(3)

When police told defendant to empty contents of his pockets on motel counter, they so intruded on him as to effect "arrest" requiring probable cause.

13. Arrest ⇐ 63.5(7)

Protective search for weapons does not itself transform seizure into arrest.

14. Arrest ⇐ 68(3)

Police conduct in asking defendant to remain at point where he was stopped did not constitute arrest, even though police delayed defendant's return to his motel by 25 minutes, where delay was only long enough to make narrow inquiry into defendant's presence at airport where airplane suspected of containing large quantity of cocaine was being investigated, and police officer drove defendant to motel in just as unintrusive and casual manner as defendant would have been transported in cab.

15. Arrest ⇐ 63.4(17)

Arrest of defendant was supported by probable cause, where defendant's arrival at almost empty airport was unusually late and therefore well suited for unobserved checking or partial unloading of plane suspected of carrying large quantity of cocaine, and two or three minutes after two police officers left defendant they encountered in motel lobby individual who fit description of pilot of airplane, stopped him to ask him if he was guest of motel, and he exhibited key to room that officers had just learned was rented by defendant.

16. Searches and Seizures ⇐ 7(26)

Defendants who were motel guest lacked standing to challenge law enforcement officers' examination of motel records.

17. Searches and Seizures ⇐ 3.3(4), 7(28)

Where motel room occupant voluntarily consented to police officer's entry and knew that officer was in fact police officer, entry was constitutional; thus, officer was permitted to seize cap which was clearly visible to officer.

18. Searches and Seizures ⇐ 7(26)

Although Government established that defendant had bought automobiles in name of corporation, where there was no evidence regarding source of money used to purchase vehicle, nor any proof that either defendant or codefendant had ever driven or been in cars, defendant and codefendant failed to carry their burden of establishing they had standing to contest search of automobiles.

19. Criminal Law ⇐ 412.2(3)

Miranda warnings given to defendant were not rendered inadequate by failure of officers to also warn defendant he was suspect in drug transaction.

20. Criminal Law ⇐ 627.8(6)

To prevail on claim that prosecution withheld requested, exculpatory material, defendants must show that prosecution either withheld or suppressed favorable evidence that would have created reasonable doubt otherwise absent.

21. Criminal Law ⇐ 627.8(6)

Although motel records which established that one defendant had rented motel room in Fort Lauderdale from July 14 through August 9th were favorable to defense, even though they had no bearing on that defendant's uncontested whereabouts on night of his arrest, in that records suggested that defendant flew to Montgomery from Fort Lauderdale, rather than from Colombia, tending to undercut Government's contention that both defendants imported cocaine, defendants failed to show that prosecution withheld records in violation of its duty to produce requested, exculpatory evidence, where defense lawyers merely asserted that they had "no recollection of having seen" documents, and government witnesses recalled that records had been furnished to all defense counsel.

22. Criminal Law ⇐ 636(3)

Where defendants were present during general voir dire of veniremen, judge in no way excluded them from individual voir dire, and they completely failed to suggest any cause for their absence, defendants waived their right to be present during individual voir dire of veniremen held to determine any prejudgments veniremen might have concerning defendants' guilt. Fed. Rules Cr.Proc.Rule 43(b)(1), 18 U.S.C.A.

23. Criminal Law ⇐ 1166.11(1)

Even assuming that Federal Rule of Criminal Procedure governing presence of defendants at trial was violated by their absence

in individual voir dire of veniremen, error was harmless, where their lawyers thoroughly explored effect of pretrial publicity during four hours of individual voir dire, defense was granted recess to decide how to use its peremptory strikes, and strikes were exercised in court before defendants. Fed. Rules Cr.Proc.Rule 43, 18 U.S.C.A.

24. Jury ⇐ 131(10)

Considering that purpose of individual voir dire of veniremen was to determine whether pretrial publicity would prevent any veniremen from applying correct standards for determining guilt or innocence, it was entirely proper, by reading instructions describing presumption of innocence and burden of proof, to make certain that each potential juror understood law in making that determination.

25. Criminal Law ⇐ 438(8)

Trial court did not abuse its discretion in playing before jury silent videotape showing police executing search warrant for plane, where defendants were suggesting that cocaine had been placed on plane after pilots' departure, by someone entering plane before police searched it, defendants tried to prove this unknown entry by showing that although one of plane's curtains were drawn back at midnight prior to search, next morning two curtains were open, and videotape was highly probative of condition of curtains at time of search.

26. Criminal Law ⇐ 438(8)

Trial court did not abuse its discretion in allowing videotape showing police executing search warrant for plane, where mere viewing of duffle bags as they were found on plane and opening of those bags to reveal their contents did not threaten to inflame jury.

27. Criminal Law ⇐ 413(1)

Where purpose of eliciting, through cross-examination of government agent, defendant's allegedly exculpatory statement at time of his arrest that he believed only mail was aboard

airplane was to prove that defendant had no knowledge of plane's illicit cargo, statement was inadmissible hearsay in defendant's prosecution on drug-related charges.

28. Criminal Law ⇐ 706(2)

Absent evidence that prosecution introduced with knowledge of its falsity evidence that gasoline found in airplane that had contained large quantity of cocaine could not be obtained in this country, defendants charged on drug-related charges were not entitled to new trial even if testimony could have affected judgment of jury.

29. Criminal Law ⇐ 696(2)

In absence of defense's motion to strike inaccurate testimony, court and prosecution are not under duty to strike it.

30. Criminal Law ⇐ 720(7)

Prosecutor's description of defendants' defenses as "incredible and ludicrous" was not inflammatory.

31. Criminal Law ⇐ 686(1)

Trial court has broad discretion in deciding whether to permit party to reopen case.

32. Criminal Law ⇐ 684, 686(2)

Trial court did not abuse its discretion in allowing prosecution, either on grounds of rebuttal or reopening its case, to present two witnesses who testified with respect to airplane's onboard navigation computer in effort to establish that plane had flown from point outside the United States, where Government represented to court that only on day after resting its case in chief had it realized computer might contain evidence, Government immediately informed defense of discovery, and defense counsel cross-examined witnesses thoroughly.

33. Drugs and Narcotics ⇐ 124

Evidence in defendants' prosecution on narcotics charges, including evidence that on board airplane computer which stored

coordinates of last way points entered into them, displayed way point for Cancun, Mexico, which was described as first landfall for plane north from Colombia but avoiding Cuba, was sufficient to establish importation of narcotics.

34. Criminal Law ⇐ 792(3)

By instructing jury on aiding and abetting, trial court did not lead jury to believe that even if there was insufficient evidence of conspiracy defendants could nevertheless be convicted for conspiracy if jury found that defendants had aided and abetted operation.

David B. Byrne, Jr., John M. Bolton, III, Montgomery, Ala., for Willis.

J. Mason Davis, Sirote, Permutt, Friend, Friedman, Held & Apolinsky, Birmingham, Ala., for Mahdi.

Mark Kadish, Alan J. Baverman, Atlanta, Ga., for defendants-appellants.

John C. Bell, U.S. Atty., Charles Truncale, Asst. U.S. Atty., Montgomery, Ala., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Alabama.

Before HENDERSON and HATCHETT, Circuit Judges, and NICHOLS*, Senior Circuit Judge.

ALBERT J. HENDERSON, Circuit Judge:

William Willis, also known as William Benton Ziegler (Willis), and Omar Ashad Mahdi appeal from convictions for conspiring to import, importing, conspiring to possess with intent to distribute and possessing with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846, 952 and 963. We affirm.

*Honorable Philip Nichols, Jr., U.S. Circuit Judge for the Federal Circuit, sitting by designation.

On August 3, 1983, at around 9:45 p.m. a twin-engine Piper Navajo, an expensive passenger plane, landed at Montgomery Airport's Dannelly Field and taxied onto the runway of Montgomery Aviation, a fixed base operation used primarily by private aircraft. Two linemen, Todd Stettler and Ken Moseley, used "light wands" and a flashlight to signal the Piper that it should park in a well-lit space next to the terminal building. Instead, the plane continued to the opposite end of the parking ramp, halting in a dark spot over one hundred yards from the building. R.Vol. 10 pp. 204-07. In the experience of the linemen it was very unusual for a plane to disobey parking signals, especially at that time of night. *Id.* p. 295. Moseley proceeded toward the aircraft. A white male, later identified as David Joseph Newcomb, crawled out through a small door on the pilot's side of the cockpit and intercepted Moseley about halfway between the plane and the building. Moseley asked if the Piper needed fuel, and Newcomb replied affirmativeley, adding that he needed to use a phone. Newcomb said that someone would be out to unload the aircraft later that night, but that the plane might not remain overnight. Moseley then took Newcomb to a phone inside the terminal building. *Id.* pp. 269-70.

Meanwhile, Stettler had returned to Montgomery Aviation's office. There he was approached by a black male, later identified as the appellant Mahdi, who ordered fuel for the Piper. Mahdi filled out an order slip specifying the plane's tail number, an owners's name ("CIB Auto"), partial address ("Nashville Tennessee"), pilot's name ("Ron Allen"), and schedule ("Plan to depart"). *Id.* pp. 209-10, 219. Mahdi and Newcomb apparently slipped away unobserved shortly afterwards, leaving no further instructions.

Moseley walked toward the aircraft while Stettler went to get the fuel truck. As they approached the plane, they noticed that its rear was heavily overloaded. *Id.* p. 211. They also observed that the plane had undergone a "Panther Conversion," a distinctive series of engine and propeller modifications costing approximately $100,000.00, which increase the flying range and engine capaci-

ty of the aircraft. R.Vol. 10 p. 212, Vol. 12 pp. 760-61, Vol. 13 p. 936. While Stettler readied the fuel truck hose, Moseley used the truck's six-foot ladder to reach the cockpit windows, shining his flashlight on them to check for dirt before washing them, a routine service. To his surprise, Moseley saw that the cabin seats of the luxury passenger plane were filled with large green duffel bags stuffed with hard, football-sized packages. He also noticed a five-man life raft. All window curtains on the Piper appeared tightly drawn. After consulting with Stettler, who also viewed these conditions, Moseley alerted airport security. The linemen did not refuel the plane. R.Vol. 10 pp. 210-12, 271-73.

Tyrone Anderson, a narcotics officer of the Alabama Bureau of Investigation (ABI), soon arrived. After hearing the linemen's accounts of their observations, he looked through a gap in the curtains on a rear window of the plane and saw the duffel bags and raft. His extensive experience with narcotics investigations told him that the particular type of bags and shape of packages strongly indicated the presence of a huge amount of cocaine. R.Vol. 8 pp. 67-70.

About 10:20 p.m. Stettler left for home. On the way he saw Mahdi walking along the road, away from the airport. Stettler returned to Montgomery Aviation and so informed Anderson. Anderson, Stettler and Moseley then sought the aid of state trooper Steve Dixon and his car to search for Mahdi. After a short time, Dixon dropped Anderson and Moseley off at the airport. Dixon and Stettler continued searching and soon found Mahdi, whom Stettler readily identified, walking along the same road but in the direction of the airport. Dixon pulled over and asked Mahdi for identification. Mahdi supplied a drivers license. Dixon then had Mahdi return with him to Montgomery Aviation. Mahdi rode in the back seat of Dixon's patrol car. R.Vol. 10 pp. 213-16.

Upon their arrival at Montgomery Aviation, Anderson instructed Mahdi to move to Anderson's car. There Mahdi, while being read his *Miranda* rights, said he thought the plane contain-

ed only mail. After hearing his rights, Mahdi told Anderson that although he was a commercial pilot, the other man, whom Mahdi claimed to know only as "Ralph" had flown the Piper. Mahdi had met the plane in Louisiana, agreeing to accompany the pilot on the flight for $500.00. When he realized the pilot had left Montgomery Aviation, Mahdi assumed he was renting a car. But on his way to the rental agencies Mahdi realized they would be closed and started to return to the airport terminal. Mahdi suggested that Anderson break into the plane and offered to help him. R.Vol. 3 p. 728; Vol. 8 pp. 83-115.

At 10:30 p.m. Lieutenant Bradford of the ABI arrived on the scene, receiving a full account from Moseley. When two more ABI officers, Rhegness and Ward, appeared around 10:40 p.m., Bradford briefed them on the events. Before leaving to check local motels, Rhegness and Ward discovered that the owner's name listed by Mahdi on the fuel order was false.

In response to a call from Rhegness, Sergeant Supervisor Randall Brown of the Montgomery Police Department arrived at 11:40 p.m. By that time several police cars, at least one of which was a marked state trooper unit, had been moved near the plane, their headlights shining on its front and forward right side. Standing at the gate next to Montgomery Aviation's office, between 100 and 140 yards from the plane, Brown had an unobstructed view of this scene. He could see several persons, including a uniformed state trooper, moving around the plane, though he could not identify them individually. R.Vol. 11 pp. 389-91, 405-07. Brown walked to the plane, received all the information from Bradford and went to use the office telephone. The office had two large glass windows and a glass door permitting a view of both the gate and the plane.

At midnight Brown was still on the phone, his left side turned to the windows. Brown saw a cab pull just inside the gate. A bearded white male, later identified as Willis, stepped out from the passenger side and stood next to the front door. From this spot he had essentially the same view as did Brown from his posi-

tion. Willis looked in the direction of the lighted plane, police and cars, then turned and looked at Brown, making eye contact. Brown was dressed in ordinary slacks, shirt and tie but also wore his police badge. On the counter next to Brown was his hand radio. Brown's gun was holstered on his right side and therefore was not visible to Willis. Willis immediately got back into the cab and left the airfield. R.Vol. 11 pp. 389-91, 393-410. Brown went to his car, radioed for a marked unit to stop the cab and immediately followed the taxi. Several miles from the airport, he pulled in behind the stopped cab and a police car at about 12:10 p.m. *Id.* p. 411-12.

Brown questioned the cab driver, Tommy Smith, who said he had picked up Willis in front of the Howard Johnson's motel, which was only half a mile from that point. Willis had told Smith he was meeting a passenger coming from Nashville at midnight. Smith had driven to the main terminal, but after a brief wait Willis asked to go to Montgomery Aviation. When the cab pulled inside Montgomery Aviation's gate, Willis got out, then got back in, said he was hungry and told Smith to take him back to the motel. R.Vol. 6 pp. 11-13; Vol. 8 pp. 214-15, 231-32.

Brown then approached the cab, asked Willis to step out, patted him down for weapons, told him there was a problem at the airport and asked him for identification. Willis supplied his driver's license. In response to further questioning, Willis stated he had gone to the airport to meet a friend, whom he first referred to as John Jamison, then John Johnson, and was heading back to his room at the nearby Howard Johnson's. Willis explained he planned to travel with friends to a golf tournament in Mobile. Around 12:15 p.m., Rhegness and Ward pulled up, also asking for Willis' license. After he again produced the license, they read Willis his *Miranda* rights. He said he understood his rights and told them he was an independent coal broker, travelling alone on business but planning to play golf in Mobile. R.Vol. 8 pp. 260-62. He agreed to remain with Brown while they checked his story at the motel. R.Vol. 3 pp. 729-30; R.Vol. 8 p. 262.

Rhegness and Ward then proceeded to the Howard Johnson's

motel, where they identified themselves as police officers to the clerk, Elizabeth Lincoln. Lincoln showed them Willis' registration card for Rooms 220, 222 and 224. Lincoln reported that Willis had registered alone, paying cash, but on the card he had specified two persons would occupy each room. While the agents examined the card and questioned Lincoln further, Newcomb walked up, interrupting their questioning to ask Lincoln for change. Noting that he fit the description of the white male who had emerged from the plane, the agents identified themselves as ABI narcotics agents and asked if he was a guest of the hotel. Newcomb answered affirmatively, then produced a key to Room 220. Rhegness then advised Newcomb of his *Miranda* rights. Upon further questioning, Newcomb claimed that he had travelled from Ft. Lauderdale to Montgomery in the car of "some guys." He did not know the make and model of the automobile and did not know William Willis. Asked how he came into possession of the key to one of Willis' rooms, Newcomb shrugged. R.Vol. 11, pp. 446-51.

Rhegness stayed with Newcomb while Ward stepped out to radio Brown requesting that he and Willis come to the motel. On the way to his car, Ward observed two men walking from the room area toward the office. He met them, identified himself as an ABI narcotics agent and asked if they were staying at the motel. One of the men, later identified as Ronald DeFranco, displayed a key to Room 224. Ward asked the men to step inside the lobby, where he read DeFranco and his companion, later identified as Harry Dale Ziegler, their *Miranda* rights. *Id.* pp. 451-55.

When Willis and Brown arrived and entered the lobby, Ward asked if Willis knew Newcomb, DeFranco and Ziegler. Willis replied, "Yes, I know them. They are my friends. They are the ones I come up here with." *Id.* pp. 455, 464-65. The police then had the four men place their personal effects in separate piles on the lobby counter. Around 1:10 p.m., Special Agent Charles Park of the Drug Enforcement Administration (DEA) came to the motel. After Rhegness, Ward and Brown informed him of the events, Park advised the suspects of their *Miranda* rights and formally arrested them. *Id.* pp. 491-96.

Taking Newcomb's key to Room 220 and Ziegler's key to Room 224 from the counter, Park instructed the suspects to retrieve the rest of their property. The DEA agent noticed a set of car keys picked up by DeFranco. When Park took the keys, DeFranco volunteered that they fit his Buick back home in Illinois. Park tried the keys in a maroon and gray Buick with Florida license plate parked in the Howard Johnson's lot, and he found they opened the door and trunk. Upon opening the trunk, he found a suitcase, which he also opened. Inside were two night scopes. These optical instruments amplify dim light enough to permit vision in areas that to the naked eye appear dark. *Id.* pp. 496-502.

Aware that six persons were registered as guests in rooms 220, 222 and 224, but that only four men were in custody, Park, Rhegness and Ward then proceeded to the rooms. Park first knocked on 220 and received no reply. He then used Newcomb's key to enter, stepped in and saw no one was there, and left. Park repeated this entry procedure in Room 224, finding no one. *Id.* pp. 498-504. He then telephoned Room 222. A man answered, and Park identified himself as a police officer, explaining he was next door and wanted to talk face to face. The person in Room 222 said "Okay." Park and Rhegness then knocked, and a man identifed as William Edward Cox opened the door. Park exhibited his credentials and asked to enter, and Cox opened the door all the way, saying "Come in." When Park entered, he noted a second man, identified as Lee Curry, lying on a bed. Park also saw, sitting on the television in plain view, a cap bearing the slogan "Navajo Panther," which Park recognized as the name of the specially modified aircraft. Park asked Curry to whom the room was registered, and Curry indicated Cox. When Park asked Cox, however, he said the room was registered to "Johnson." Both Cox and Curry were then arrested. *Id.* pp. 503-05.

Pursuant to a search warrant obtained the morning of August 4, 1983, police searched the Piper Navajo and found over 800 pounds of cocaine, having a street value of approximately $230,000,000.00. R.Vol. 11 p. 532; R. Vol. 12 p. 696. Cocaine is derived from the coca plant, which is indigenous to South

America. R.Vol. 12 p. 787. Also found was a Coca Cola can bearing in Spanish the inscriptions, "Keep Colombia Beautiful" and "canned under the authorization of the Coca-Cola Company by the Gaseosas Industries, Incorporated, Bogota. Registered under the Ministry of Health number 00240, a Colombian industry." *Id.* pp. 742-44. In addition, the plane contained numerous Caribbean, South American and world aeronautical charts. Mahdi's fingerprints were on many of these charts, including one with tick marks indicating a flight path over the Gulf of Mexico into Alabama. *Id.* pp. 722-27, 811-19. The aircraft also held life vests and a five-person raft, equipment customarily stored on planes flying over fifty miles or more of water. *Id.* p. 766. Police found twenty-seven of Mahdi's fingerprints and thirty-four of Cox's fingerprints within the plane. *Id.* p. 822. The aircraft registration certificate named the owner as "General Bituminous, Inc., 781 West Oakland Park Boulevard, Suite 508, Fort Lauderdale, Florida." A search of the files of the Florida Secretary of State revealed no record of any such corporation, foreign or domestic. *Id.* pp. 530-31.

Although the plane was equipped with numerous extra fuel tanks increasing its total capacity to approximately 371 gallons, only twenty-one gallons were onboard at the time of search. The evidence disclosed that the plane as modified was capable of travelling non-stop from Colombia to Montgomery on 350 gallons of fuel. *Id.* pp. 762-66.

The personal effects of the suspects provided further evidence of their conspiracy. A key found on Willis' person fit the locks on the Piper Navajo's nose baggage compartment and side door. R.Vol. 12 p. 614. Mahdi, Newcomb and Cox carried pilots' licenses and health certificates. R.Vol. 11 pp. 509-15. Additional evidence suggested that the participants had communicated with one another by telephone.

On August 5, 1983, police towed the maroon and gray Buick, as well as a second, lighter colored Buick, also with Florida tags, to the ABI office. Search of the first car produced the suitcase con-

taining the night scopes and various registration documents showing the car was purchased by a "William Thompson" for "Leister Corp. Inc., 15200 North Federal Highway Building 2, Suite 112, Fort Lauderdale, Florida." Registration documents in the second Buick revealed the same information. The dealer who sold the vehicles identified Willis as the purchaser. The Florida Secretary of State has no record of the Leister Corp. Inc. R.Vol. 12 pp. 667-682. Fingerprints of Ziegler were discovered in the first Buick. In the second Buick was a business card bearing the name "Ronald DeFranco." R. Vol. 11 pp. 471-74. In addition, the trunk contained a hand radio and two empty duffel bags identical to those found on the plane. R.Vol. 11 pp. 471-74.

After a lengthy suppression hearing in which the defendants challenged the admissibility of virtually all evidence in the case, the United States District Court for the Middle District of Alabama suppressed Mahdi's statements to state trooper Dixon; Willis' statements prior to being advised of his *Miranda* rights by Ward and Rhegness; and the physical evidence obtained from Rooms 220, 222 and 224, with the exception of the "Navajo Panther" cap. Following a jury trial, Willis and Mahdi were convicted on all counts and sentenced to a total of twenty-four and fourteen years, respectively. On appeal, they claim nineteen errors in their trial.

A. Suppression Issues

Willis and Mahdi challenge the admission of all evidence arising from their arrests and the admission of various physical evidence as violative of the fourth amendment ban on unreasonable searches and seizures.

[1,2] By the time Stettler had returned to report sighting Mahdi on the highway, police had probable cause to believe that the plane was involved in an ongoing crime. "Probable cause... exists where the facts and circumstances within the collective knowledge of law enforcement officials, of which they had reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe that an offense has been or is

being committed." *United States v. Blasco*, 702 F.2d 1315, 1324 (11th Cir.1983). A reviewing court may examine the collective knowledge of law officers if they maintained at least a minimal level of communication during their investigation. *E.g., United States v. Esle*, 743 F.2d 1465, 1476 (11th Cir.1984). The level of communication among the investigating officers here is more than enough for us to aggregate the officers' knowledge at any given moment.

[3] We agree with the district court that the odd parking of the Piper Navajo would create in reasonable minds a suspicion of illegal activity. By ignoring the linemen's plainly visible signals to stop in a convenient, well-lighted space and halting instead in a remote dark spot on the far end of the ramp, over one hundred yards from the office, the pilots obviously intended to prevent even casual inspection of the aircraft. In fact, Stettler testified he could not remember an instance when a plane ignored his signals. R.Vol. 5 p. 27; Vol. 10 p. 295. The tightly closed curtains evinced a suspicious intent to conceal the contents of a visibly heavily loaded plane. The conduct of the occupants also evidenced a suspicious intent. Newcomb intercepted Moseley, the lineman, before Moseley reached the plane. Then, leaving only incomplete directions for servicing the plane, Mahdi and Newcomb soon disappeared. The stuffed duffel bags in the passenger seats of the luxury passenger plane strongly suggested drug smuggling. The authorities learned that the ownership information provided by Mahdi on the fuel order was false. Finally, the officers recognized in these and additional details a behavior pattern typical of those who import cocaine by air. The officers' previous experience included a May 1983 seizure at Dothan, Alabama, of a very similarly transported cocaine shipment. We readily conclude that these facts would lead a reasonable mind to believe that the plane was involved in the commission of an ongoing crime, most probably importing cocaine or other contraband.

[4-7] Having established that "crime probable cause" arose before any of the challenged occurrences, we next look to the officers' knowledge of events linking Mahdi and Willis to the plane.

The degree of connection required by the Constitution depends upon the extent of each investigatory intrusion and the law enforcement interests served by each. This circuit has established a three-tier analytical framework for such search and seizure inquiries. *United States v. Berry*, 670 F.2d 583 (5th Cir. Unit B 1982) (en banc).[1] Least intrusive are stops of a restricted investigative scope conducted in a non-coercive manner. These do not trigger fourth amendment protection at all. A stop becomes a seizure when, under all the circumstances of the intrusion, a reasonable, ordinary person in the suspect's position would believe he is not free to leave. *Id.* pp. 594-95. The fourth amendment permits such seizures only when supported by a reasonable suspicion based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889, 906 (1968). Lastly, an intrusion so much greater than a seizure as to be indistinguishable from an arrest must be supported by probable cause. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). With these principles in mind, we examine the facts of this case as they were developed through the progressively more intrusive stages of investigation, then measure the officers' knowledge at each stage against the corresponding legal standard.

1. Mahdi

[8,9] Dixon arrested Mahdi when he stopped him, asked for identification, and placed him in the back of the police car to be transported for questioning. *Dunaway v. New York, supra.* As we noted earlier, however, by the time of Mahdi's arrest there was probable cause to believe that the plane was involved in ongoing criminal activity, very likely the importation of cocaine. The arrest of Mahdi was constitutional because at that time police also had probable cause to believe Mahdi was connected to the illegal activity involving the aircraft. The known sources on whom police originally relied, Stettler and Moseley, were experienced

[1]In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982), the Eleventh Circuit Court of Appeals adopted as precedent all decisions of Unit B of the former Fifth Circuit.

airport employees who gave consistent and specific accounts of the Navajo's unusual landing. Many details of their reports were confirmed by police, and their description of Mahdi coincided with Mahdi's appearance when Dixon and Stettler saw him on the road. Stettler's identification of Mahdi as the man who had filled out the fuel order for the plane, naming both the pilot and the Owner, was in these circumstances more than enough justification for the arrest.

2. Willis

[10] Following Willis' hasty departure from Montgomery Aviation in a taxi, Brown directed a state trooper to stop the cab. Both vehicles parked on the shoulder, several miles from the airport and about half a mile from the Howard Johnson's motel. Brown soon arrived and questioned the cab driver about his fare. Not until Brown asked Willis to step out of the cab and frisked him for weapons, however, did a seizure take place.[2] The initial stop of the cab and questioning of Smith did not amount to a seizure because a reasonable, innocent passenger in a cab pulled over by police would assume that a traffic violation or other conduct by the driver was the cause of the stop. No ordinary person would conclude from this that he was not free to leave the scene. The inconvenience of waiting a few minutes while police talked with the driver, or even of the short walk to the motel, did not pose such significant limitations on Willis' freedom of movement as to constitute a seizure. But when Willis learned that police were actually interested in him rather than Smith, he was effectively seized. A reasonable person in his position would have remembered the unusually intense police activity at Montgomery Aviation and that he was noticed there by a police officer. He would conclude

[2]This pat down for weapons was the only prudent course of action, and was therefore a permissible adjunct to the seizure under *Terry*. Brown's experience told him that approaching the unidentified occupant of a car on a relatively isolated highway and late at night was potentially dangerous, *see, e.g., Adams v. Williams*, 407 U.S. 143, 147-48, 92 S.Ct. 1921, 1924, 32 L.Ed.2d 612, 618 (1972), and also that narcotics traffickers were often armed and dangerous, *see, e.g., Michigan v. Summers*, 452 U.S. 692, 702-03, 101 S.Ct. 2587, 2594, 69 L.Ed.2d 340, 349-50 (1981). In approaching Willis, Brown subjected himself to both these risks. The frisk was reasonable and did not convert the seizure into an arrest. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977).

that his momentary midnight visit to Montgomery Aviation had provoked the swift interception of the cab and that he was not free to leave until he gave police a convincing explanation for his conduct at the airport.

[11] Even as early as the stop of the cab, however, police had specific, articulable grounds for reasonably suspecting Willis' involvement with the plane. Police expected, from what Newcomb had said, that others would arrive to unload the plane. The enormous size and consequent value of the suspected cocaine shipment likewise suggested that a large conspiracy was in operation and that the other conspirators were unlikely to leave such a valuable shipment unattended for long.

Given these additional reasons to expect the arrival of coconspirators, Willis' midnight arrival at the virtually empty ramp of Montgomery Aviation in itself might provoke reasonable suspicion. The former Fifth Circuit Court of Appeals upheld an investigatory seizure made with little more cause than Willis' arrival supplied police here. In *United States v. D'Antignac*, 628 F.2d 428 (5th Cir. 1980),[3] *cert. denied*, 450 U.S. 967, 101 S.Ct. 1485, 67 L.Ed.2d 617 (1981), two officers had discovered over 28,000 pounds of marijuana on a boat at a public dock and were leaving to summon assistance via the driveway between the dock and the highway. As the police pulled onto the highway, a van approached and turned into the driveway. Based on their experience, the officers suspected that the three occupants were arriving to unload the marijuana-laden boat, which had only recently docked, and they halted the vehicle immediately after it turned. Finding the stop was valid under *Terry*, the court stressed the discovery of the marijuana, the unusually late yet relatively coincident time of the van's arrival, and the limited scope of the questioning during the seizure of the van's occupants. 628 F.2d at 434-35. *See United States v. Kreimes*, 649 F.2d 1185 (5th Cir. Unit B 1981) (where bulletin had issued for plane believed to have landed near-

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as precedent all decisions of the former Fifth Circuit decided prior to October 1, 1981.

by, nighttime seizure of occupant of a truck on rural road without headlights was based on reasonable suspicion.)

Here, the presence of cocaine on the plane was highly probable, and the time of Willis' arrival was unusually late and therefore well-suited for unobserved checking or partial unloading of the plane. Brown's questioning of Willis, though more probing than that in *D'Antignac* and accompanied by a protective weapons search, was fully justified in view of additional suspicious circumstances not present in *D'Antignac*. Willis' quick glance to the blocked plane, his startled turn, his seeing a police officer looking straight at him, and his immediate departure strongly pointed to his culpable knowledge of the contents of the plane. Flight from known law enforcement officials, or even merely evasive, nervous or apprehensive conduct in response to their attention, has many times been noted as a significant factor in the creation of a reasonable suspicion.[4] Also, Smith's account of Willis' stated reason for going to the airport—to meet a friend—and his unbelieveable excuse for departing so suddenly—hunger—demonstrated that Willis was deliberately attempting to cover his real motive for leaving the scene. From this information police could reasonably infer not only that Willis had culpable knowledge of the plane's cargo but also that he was unusually afraid of being questioned by the authorities. These specific, articulable factors taken together amply justified a reasonable suspicion that Willis was connected to the aircraft.

[12] Having decided that in seizing Willis the police acted upon a reasonable suspicion, we next turn to the time of Willis' arrest. Applying the principles enunciated in *Dunaway v. New York*, *supra*, we hold that when the police told Willis to empty the contents of his pockets on the motel counter, they so intruded on him

[4] *E.g.*, *Sibron v. New York*, 392 U.S. 40, 66-67, 88 S.Ct. 1889, 1904, 20 L.Ed.2d 917, 937 (1968); *United States v. Herzbrun*, 723 F.2d 773 (11th Cir. 1984) (hasty grabbing of bag and exiting after airport officials decided to search for weapon); *United States v. Blasco*, 702 F.2d 1315, 1325 (11th Cir. 1983) (suspected lookout becoming visibly upset on sighting police approaching drug offloading area); *Berry*, 670 F.2d at 603-04 (false identification and deliberate consealment of travelling companion); *United States v. Macias*, 546 F.2d 58, 61 (5th Cir. 1977) (making u-turn and driving away from border checkpoint).

as to effect an arrest requiring probable cause. This unproclaimed arrest preceded Park's formal arrests of the suspects by thirty minutes or more. The distinction makes no practical difference here because the appellants do not challenge the admission of any evidence that may have been adduced during this period. The issue is the same—whether, after Willis' identification of Newcomb, DeFranco and Ziegler, the police had probable cause to connect Willis with the plane, and therefore to arrest him.

[13] Despite the appellants' arguments to the contrary, we decline to find that an arrest of Willis was effected before he identified his co-conspirators. After frisking Willis,[5] Brown told him there was trouble at the airport and asked Willis for identification and for an explanation of his presence there. Five minutes after the cab was stopped, Ward and Rhegness arrived, spoke briefly with Brown and Smith, then read Willis his *Miranda* rights, which he said he understood. They asked him to stay there while they checked out his story at the motel. Brown, Willis and Smith then waited for about twenty minutes before Ward told them to proceed to the motel, Willis' intended destination all along. At Brown's instruction Willis paid off the cab, but Willis road the half-mile to the motel unhandcuffed and in the front seat of Brown's unmarked car.

[14] Although police delayed Willis' return to his motel by twenty-five minutes, we cannot regard their asking him to remain at the point where he was stopped an arrest. In *Dunaway*, by contrast, three detectives took the suspect from a home to a police station in order to conduct a full interrogation. Here, police delayed Willis' arrival at his intended destination only long enough to make a narrow inquiry into his presence at the airport. The relative brevity of this stop distinguishes this case from those involving much longer periods of seizure. *Cf. United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (ninety minutes); *United States v. Puglisi*, 723 F.2d 779 (11th Cir. 1984) (140 minutes). In a case strikingly similar to the situation

[5]A protective search for weapons does not itself transform a seizure into an arrest. *E.g., Terry; United States v. Vargas*, 643 F.2d 296 (5th Cir. Unit B 1981).

here, the Supreme Court has recently reiterated that the permissible time of detention without probable cause cannot be rigidly dictated by per se judicial guidelines. *United States v. Sharpe*, — U.S. —, 105 S.Ct. 1568, 82 L.Ed.2d — (1985). There the court explained:

> [W]e have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. [citations]. Much as a "bright line" rule would be desirable in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.
>
> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendent.

Id. at —, 105 S. Ct. at 1575. We also note that Brown drove Willis to the motel in just as unintrusive and casual a manner as Willis would have been transported in a cab. We conclude that the police did not arrest Willis until they told him to empty his pockets.

[15] In any case, within five minutes of leaving Willis on the road, Ward and Rhegness had discovered additional evidence supplying them with probable cause to arrest him. Ward testified that only two or three minutes separated their departure for the motel and their seeing Newcomb in the motel lobby. Recognizing that Newcomb matched the linemen's description of the first pilot of the Piper Navajo, they stopped him to ask if he was a guest. He answered affirmatively, showing them a key to Room 220, one of the rooms they had just learned was rented by Willis. Even without the additional suspicious conduct and evasive replies of Newcomb, DeFranco and Ziegler, police then had probable cause

to connect Willis with the plane. The subsequent arrest of Willis was supported by probable cause.

3. Motel records

When Ward and Rhegness arrived at the motel, they explained their purpose to the night clerk, Elizabeth Lincoln, who told them what she remembered about Willis. In response to their further inquiry, she showed them the motel's records of Willis' registration. The appellants now contend that by viewing these registration documents the agents violated Willis' fourth amendment rights. We disagree.

[16] Although a motel guest may have a reasonable expectation of privacy in his room, *e.g., Hoffa v. United States*, 35 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); *United States v. Bulman*, 667 F.2d 1374, 1383-84 (11th Cir.1982), courts have refused to find such an interest in records similar to the registration records here. Thus, the Court has held that a bank depositor has no interest in the bank's records of his accounts. *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). *Accord, Reporters Comm. for Freedom of the Press v. AT & T*, 593 F.2d 1030 (D.C.Cir.1978), *cert. denied*, 440 U.S. 949, 99 S.Ct. 1431, 59 L.Ed.2d 639 (1979) (phone call records). We hold that Willis lacks standing to challenge the officers' examination of the motel records.

4. The "Navajo Panther" Cap

[17] The appellants contend that Park's entry into Room 222 and his seizure of the cap he saw there violated their fourth amendment rights. The district court's finding that Cox knew Park was a police officer and voluntarily consented to Park's entry is not cleary erroneous. *United States v. Smith*, 649 F.2d 305, 309 (5th Cir. 1981). Because the entry was constitutional, Park was permitted to seize inadvertently encountered evidence in plain view, and the cap was clearly visible to him as it sat on top of the television. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

5. The Buick Automobiles

[18] The district court found that the appellants failed to demonstrate their standing to contest the searches of the Buicks. The only evidence in any way connecting Willis or Mahdi to the cars was the government's proof that Willis had bought the cars in the name of a corporation, identifying himself as William Wilson. There was no evidence regarding the source of the money used to purchase the vehicles, nor any proof that Willis or Mahdi had ever driven or even been in the cars. The burden to establish standing was on the appellants and they failed to carry that burden. *United States v. Torres*, 705 F.2d 1287 (11th Cir.1983); *United States v. Glasgow*, 658 F.2d 1036 (5th Cir. Unit B 1981).

B. Miranda Warning

[19] The appellants claim that Willis' statement of recognition in the motel lobby was inadmissible either because Willis had not received *Miranda* warnings before he made the identifications or because, even if he did receive them, these were insufficient, in that he was not also warned he was a suspect. The district judge's finding that Ward and Rhegness administered the warnings when they spoke with Willis on the highway is not clearly erroneous. Nor were the warnings inadequate. Nothing in *Miranda* or its progeny required that Willis also be advised that he was a suspect. In *United States v. Washington*, 431 U.S. 181, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977), the Court held that a sworn grand jury witness who had received his *Miranda* warnings prior to testifying could not later have his testimony suppressed on the ground that he had not been told he was a potential defendant. If the *Miranda* warnings are enough to caution a witness who has just sworn to tell the truth to a grand jury, then they were certainly sufficient for Willis.

C. Brady Material

The appellants assert that the prosecution violated its duty under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by withholding certain registration records from a

Fort Lauderdale Days Inn motel. These records, obtained by DEA agent Park from the FBI during the time of the suppression hearing, disclose that a room was rented in Mahdi's name from July 14 through August 9, 1983, the date Mahdi allegedly checked out. These records are within the scope of the defendants' general pretrial discovery requests.

[20] To prevail on this sort of a *Brady* claim, the appellants must show that the prosecution either withheld or suppressed favorable evidence that would have created a reasonable doubt otherwise absent. *E.g., United States v. Benz*, 740 F.2d 903, 915 (11th Cir.1984). These documents were favorable to the defense, even though they obviously have no bearing on Mahdi's undisputed whereabouts from August 3, 1983 on, because they suggest that Mahdi flew to Montgomery from Fort Lauderdale, rather than from Colombia. Such evidence could tend to undercut the government's contention that Willis and Mahdi imported the cocaine.

[21] But the appellants have failed to show that the prosecution withheld these records. At a post-trial *Brady* hearing, Willis' lawyers merely asserted that they "have no recollection of having seen" the documents. R.Vol. 7, pp. 2-3. Mahdi's counsel was even less certain, admitting that he had seen some papers with the Days Inn logo but saying he could not remember their substance. *Id.* pp 21-22. There is no suggestion that any other papers bearing that logo were ever involved in this case. By contrast, both DEA agent Park and Assistant United States Attorney Truncale firmly recalled that Park had furnished the records to all defense counsel during a recess at the pretrial suppression hearing. Both testified that the defense lawyers had circulated the records among themselves and then returned them. *Id.* pp. 10-15, 27-28. The trial court denied Willis' and Mahdi's motion for a new trial, holding that the government had not "acted improperly in any way with respect to the *Brady* materials." *Id.* p. 51. This constitutes a factual finding that the records were disclosed as recalled by Parks and Truncale. We cannot say that this finding was clearly erroneous. *Cf. United States v. Vargas*,

5643 F.2d 296 (5th Cir. Unit B 1981) (reviewing suppression hearing factfinding).

D. Voir dire

Because the cocaine found on the plane was the largest shipment ever seized in Alabama, extensive media coverage preceded the trial. On motion of the defendants, the district judge conducted general voir dire in open court, then questioned the veniremen individually in chambers as to any prejudgments they might have made about the defendants' guilt. All attorneys for the government and the defense were present in chambers during this questioning. Willis and Mahdi now complain that they were excluded from this individual voir dire in violation of Fed.R.Crim.P. 43(a).

An inference that the defendants were not present arises only from the form of certain questions asked during the voir dire, such as: "When you saw Mr. Mahdi this morning at counsel table, could you associate his face with the picture you saw on television?" R.Vol. 10 pp. 16, 25, 28, 35. At oral argument the government stated that the defendants were indeed absent, but not because of any exclusionary action by the court. By conceding Willis' and Mahdi's absence, the government precludes the application of *United States v. Bokine*, 523 F.2d 767, 769 (5th Cir.1975), which rejected a similar Rule 43 attack because the record did not show whether the defendant had been absent when the judge communicated with the jury.

At oral argument, the appellants conceded that their absence did no result from an exclusionary action by the trial court. Nevertheless, their attorneys, who cooperated without objection during the individual voir dire process, now urge that Willis' and Mahdi's right to be present was nonwaivable. Such a strict holding would invite deliberate sandbagging of the trial court, and we decline to adopt it. *See United States v. Bascaro*, 742 F.2d 1335, 1350 (11th Cir.1984) (failure of defendants to object to their absence from informal peremptory strike conference).

[22] Instead, we note that under Rule 43(b)(1) a defendant once present at trial "shall be considered to have waived his right to be present whenever [he] voluntarily absents himself after the trial has commenced." Subsection (a) denominates the impaneling of the jury as a stage of the trial. Given the appellants' presence during the general voir dire, their admission that the judge in no way excluded them from the individual voir dire and their complete failure to suggest any cause for their absence, we readily conclude that Willis and Mahdi waived their right to be present during the latter proceeding. *Eg., United States v. Gagnon*, — U.S. —, 105 S.Ct. 1482, 84 L.Ed.2d 486, (1985) (per curiam) (holding that failure by a defendant to invoke his Rule 43 right to attend a conference he knows is taking place constitutes a valid waiver); *Taylor v. United States*, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1073); *Hall v. Wainwright*, 733 F2d. 766, 775 (11th Cir. 1984); *United States v. Benevides*, 596 F.2d 137, 139 (5th Cir. 1979) (no suggestion by defendants that their absence was other than voluntary).

[23] Moreover, the appellants have failed even to suggest any prejudice arising from their absence. Their lawyers thoroughly explored the effect of pretrail publicity during four hours of individual voir dire. The defense was then granted a recess to decide how to use its peremptory strikes, and the strikes were exercised in court before the defendandts. Even assuming a Rule 43 violation, the error was harmless. *Rushen v. Spain*, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); *Rogers v. United States*, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); *Proffitt v. Wainwright*, 685 F.2d 1227, 1258 n. 57 (11th Cir. 1982) (collecting cases), modified on reh'g, 706 F.2d 311, *cert. denied*, — U.S. —, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983); *Henderson v. United States*, 419 F.2d 1277 (5th Cir. 1970). See *United States v. Bascaro*, 742 F.2d at 1350.

[24] Willis and Mahdi further challenge the individual voir dire on the ground that the district judge preconditioned the veniremen's responses to the questions of defense counsel. During their lengthy voir dire, the first and second veniremen gave

confusing responses, primarily because they were unsure of their duties and functions as jurors. The roundabout manner of questioning contributed to their confusion. As the third and each subsequent venireman entered the judge's chambers, the district court read instructions describing the presumption of innocence and the burden of proof. Defense counsel made no objection then, but now assert that these instructions masked the alleged bias created by pretrial publicity. We disagree, finding the judge's actions well within his broad discretion under Fed.R.Crim.P. 24. *E.g., United States v. Brunty*, 701 F.2d 1375, 1378 (11th Cir. 1983). Considering that the purpose of the individual voir dire was to determine whether pretrial publicity would prevent any venireman from applying the correct standards for determining guilty or innocence, it was entirely proper to make certain that each potential juror understood the law in making that determination.

E. Evidentiary issues

Willis maintains that the district court erred in admitting his statement in the Howard Johnson's lobby that he knew and recognized Newcomb, DeFranco and Ziegler as his friends with whom he had travelled to Montgomery. He now urges that the statement was inadmissible under Fed.R.Evid. 801(d)(2)(E). This argument is irrelevant in view of the fact that the district judge properly allowed the statement to be introduced as a non-hearsay admission by a party opponent. Fed.R.Evid. 801(d)(2)(A).

Counsel for Mahdi additionally complains that the district judge erred in not giving a limiting instruction before Agent Ward testified as to Willis' statement in the lobby. Defense counsel failed to request such an instruction despite the fact that an eleven minute recess intervened between the government's question and Ward's answer. Fed.R.Evid. 105. *E.g., United States v. Vitale*, 596 F.2d 688 (5th Cir.1979). Furthermore, when the government later introduced the same statement through Agent Rhegness, the defense requested and received the appropriate limiting instruction. R.Vol. 12 p. 626.

[25, 26] The appellants also attack, as unduly prejudicial under Fed.R.Evid. 403, the playing before the jury of a silent videotape showing police executing the search warrant for the plane. The convictions are reversible only if the district court's ruling constitutes an abuse of discretion. *E.g., Stallworth v. Illinois Central Gulf* RR, 690 F.2d 858 (11th Cir. 1982); *United States v. Johnson*, 558 F.2d 744, 746 (5th Cir.1977), *cert. denied*, 434 U.S. 1065, 98 S.Ct. 1241, 55 L.Ed.2d 766 (1978). The tape was highly relevant because, among other reasons, the defendants were suggesting that the cocaine had been placed on board after the pilots' departure, by someone entering the plane before the police searched it. The defendants had tried to prove this unknown entry by showing that although only one of the plane's curtains was drawn back at midnight of August 3, 1983, the next morning two curtains were open. The videotape was highly probative of the position of the curtains at the time of the search. In any case, we do not believe that mere viewing of the duffel bags as they were found on the plane and the opening of those bags to reveal their contents threatened to inflame the jury. We find no abuse of discretion.

[27] The appellants also take issue with the court's ruling that the defense could not elicit, through the cross-examination of Agent Anderson, Mahdi's allegedly exculpatory statements at the time of his arrest. Obviously, the defense sought to place Mahdi's remarks before the jury without subjecting Mahdi to cross-examination. This is precisely what is forbidden by the hearsay rule. On appeal, counsel for the appellants inexplicably argue that Mahdi's out-of-court statement—that he believed only mail was aboard the plane—was not hearsay because it was offered to prove only that Mahdi had no knowledge of the plane's illicit cargo. Again, this is precisely the issue on which the statements clearly would be offered for their truth, and therefore the issue on which the remarks are unquestionably hearsay. Fed.R.Evid. 802. The appellants do not suggest any hearsay exception, and we know of none.

F. Prosecutorial Misconduct

To bolster its contention that the plane had flown from a point outside the United States, the government presented an aviation expert who testified in part that the green gas he found in the Piper Navajo could not be obtained in this country. Overnight, defense counsel secured from a Detroit airport just this type of fuel, and they exhibited it before the jury the next day. So effective was this rebuttal that in closing argument the prosecution conceded the inaccuracy of this portion of the expert's testimony and asked the jury to reject it. No motion was made to strike the testimony.

[28, 29] Willis and Mahdi now urge that they are entitled to a new trial because the testimony could have affected the judgment of the jury. Even assuming this effect, we find no evidence that the prosecution introduced the evidence with any knowledge of its falsity. This is a prerequisite to relief. *E.g., Ross v. Hopper*, 716 F.2d 1528, 1533 (11th Cir. 1983). The further contention that the court and the prosecution were under a duty to strike this testimony, but that the defense attorneys' failure to make such a motion is immaterial, is frivolous.

[30] Counsel for appellants also charge that the prosecution at five points in the trial expressed personal opinions concerning the defendants' guilt. A fair reading of these statements reveals that the prosecutor merely drew logical inferences from the facts. The prosecution's description of Willis' and Mahdi's defenses as "incredible and ludicrous" was not inflammatory. The appellants additionally claim that the government several times referred to the defendants' failure to testify, but a reading of the statements in context reveals these contentions are frivolous.

G. Reopening of the government's case

After the defendants' lawyers revealed the falsity of the prosecution's green fuel evidence, the government moved to present the testimony of two other aviation experts on the alternate grounds of rebuttal and of reopening its case. The district court

granted the motion on both grounds, and the prosecution then called two witnesses who testified with respect to the plane's on-board navigation computer. Used to build flight plans, these machines store the coordinates of the last way points entered into them. This particular computer displayed a waypoint for Cancun, Mexico, which was described as the first landfall for a plane travelling north from Colombia but avoiding Cuba; a second point directly north of Cancum, near Evergreen, Alabama; a third point slightly northwest of Montgomery; and a final point near Greenland. R.Vol. 13, pp. 1030-35, 1045-46, 1096. The government represented to the court that only on the day after resting its case in chief had it realized the computer might contain such evidence. R.Vol. 13, pp. 1011, 1023.

[31,32] The trial court has broad discretion in deciding whether to permit a party to reopen a case, *e.g., United States v. Mounares*, 700 F.2d 647, 652 (11th Cir. 1983), and no effort has been made to show here how Willis and Mahdi were prejudiced by the belated presentation of this proof. The government immediately informed the defense of this discovery, and defense counsel cross-examined the new witnesses thoroughly. *E.g., United States v. Marino*, 562 F.2d 941, 944 (5th Cir. 1977) *cert. denied*, 435 U.S. 996, 98 S.Ct. 1647, 56 L.Ed.2d 84 (1978). We cannot say that the trial court abused its discretion in admitting the evidence.

H. Sufficiency of the evidence

[33] Willis and Mahdi contend that the evidence was insufficient to prove importation. The foregoing recitation of the facts before the jury indicates abundant evidence pointed to the plane's departing with its illicit cargo from Colombia. We find it more than sufficient to support the jury's verdicts on Counts 1 and 2.

I. Jury Instructions

[34] The appellants finally contend that the court, by instructing the jury on aiding and abetting, led the jury to believe that even if there were insufficient evidence of conspiracy the defen-

dants could nevertheless be convicted for conspiracy if the jury found Willis and Mahdi had aided and abetted the operation. Such an assertion flatly ignores this circuit's recent observation to the contrary. "The argument that supplying an instruction on aiding and abetting improperly reduces the government's burden of proof on conspiracy has been decisively rejected by this court." *United States v. Walker*, 720 F.2d 1527, 1542 (11th Cir.1983).

The judgments of conviction are AFFIRMED.

No. 83 - 7651

D.C. Docket No. 83 - 101

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM WILLIS a/k/a WILLIAM BENTON ZIEGLER,
OMAR ASHAD MAHDI,
Defendants-Appellants.

Appeals from the United States District Court for the
Middle District of Alabama

Before HENDERSON and HATCHETT, Circuit Judges, and NICHOLS*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of conviction of the said District Court in this cause be and the same are hereby, AFFIRMED.

*Honorable Philip Nichols, Jr., U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Entered: April 23, 1985
For the Court: Spencer D. Mercer, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: JUN 12, 1985

APPENDIX B
DISTRICT COURT OPINION AND ORDER REGARDING MOTION TO SUPPRESS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA
vs. CR. NO. 83-101-N
DAVID JOSEPH NEWCOMB: et al
Defendants

ORDER

The Court has before it various motions of defendants in this case, including defendants' motions to suppress evidence. In accordance with the Court's memorandum opinion, it is hereby

ORDERED that defendants' motions to suppress are granted in part and denied in part. The Court hereby ORDERS the suppression of all statements defendant Mahdi made to State Trooper Dixon; all statements made by defendant Willis to Sergeant Brown prior to the time Willis was taken to Howard Johnson's; and all items seized from Rooms 220, 222, and 224 at Howard Johnson's other than the Panther Conversion hat.

Defendants also have moved for a *James* hearing. The scope of the suppression hearing was such, however, that the Court believes a separate hearing to be unnecessary for it to determine whether any evidence is admissible within the strictures of *United States v. James*, 590 F. 2d 575 (5th Cir.) *cert. denied*, 442 U.S. 917 (1979). Accordingly, it is hereby

ORDERED that defendants' motions for a *James* hearing are denied as moot.

Defendant Curry has filed motions to require the Government to produce a list of its witnesses, to produce all statements of persons it will not call as witnesses, and to disclose the existence of a mail cover. None of these materials are within the discovery materials to which defendants are entitled. The Court also notes

that defendant Curry filed these motions considerably beyond the deadline for pre-trial motions. Accordingly, it is hereby

ORDERED that defendant Curry's motions to require the Government to produce a list of its witnesses, to produce statements of persons not to be called as witnesses, and disclose the existence of a mail cover are denied.

It is further ORDERED:

1. That the motions filed by defendants Cox and Ziegler to adopt the motions of other defendants are hereby granted.

2. That defendants' motions to dismiss the indictment are hereby denied.

3. That defendants' motions for severance and defendant Mahdi's motion to sever the counts in the indictment are hereby denied.

DONE this 7th day of October, 1983.

Truman Hobbs

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA

vs. CR. NO. 83-101-N

DAVID JOSEPH NEWCOMB; et al

Defendants

MEMORANDUM OPINION

On October 7, 1983, the Court ruled on defendants' motions to suppress. The following is the Court's opinion supporting that order.

STATEMENT OF FACTS

Sometime between 9:15 and 9:40 P.M. on August 3, 1983, a twin-engine Piper Navajo aircraft landed at Dannelly Field in Montgomery, Alabama. The plane taxied onto the runway of Montgomery Aviation, a fixed based operation used primarily by privately owned planes. Two of Montgomery Aviation's linemen, Todd Stettler and Ken Moseley, came out of the office to meet the plane. Using "light wands," Stettler attempted to direct the plane to park in the lighted area by the office. Instead, the plane continued on to an unlighted area about 140 yards from the office and parked.

After the plane parked, Stettler saw one of the two occupants climb out through a door in the front window of the plane. Stettler and Moseley started toward the plane, and a white male met them about halfway. He asked them for a phone, and they directed him to the office. He also told them that somebody might come by later to unload the plane. After the white male continued on to the office, a black male gave Stettler a fuel order for the

plane. On the fuel order he indicated that the plane's owner was CIB Auto in Nashville. Both males then left the area.

When Stettler and Moseley drew near the plane, they observed that it was loaded down in the rear. Using a flashlight, they peered inside and saw that the plane was loaded with duffel bags. The bags were in the rear of the plane amongst the seats. Stettler and Moseley decided not to refuel the plane and called airport security.

At about 9:50 P.M., Tyrone Anderson, a narcotics officer with the Department of Public Safety, received a call indicating that an airplane had landed at Dannelly in a suspicious manner. When Anderson arrived at Montgomery Aviation, he observed the Navajo. The curtains were drawn on all of the windows except one. Through that window Anderson saw the duffel bags. Anderson then spoke to Stettler and Moseley, who described the pilots, the manner in which the plane parked, and the pilots' behavior afterwards.

After speaking with Anderson, Stettler left to go home. On the way he saw the black male walking along the road. He returned to Montgomery Aviation and told Anderson. Anderson, Stettler, and Moseley then went with Steve Dixon, a state trooper, to search for the black male in Dixon's unit. After a short time, Dixon returned Anderson and Moseley to the airport, and then continued his search with Stettler. They spotted defendant Mahdi on Route 80, walking back toward the airport, and brought him to Montgomery Aviation.

Mahdi remained in Dixon's car for five to ten minutes. Because he was in the back seat, he could not have gotten out; the doors do not unlock from the inside. Anderson then took Mahdi to his own car and read Mahdi his *Miranda* rights. While Anderson was reading from the rights form Mahdi said he thought the plane contained only mail. After hearing his rights, Mahdi stated that he understood but would not sign the waiver form. Mahdi then

told Anderson he would talk so long as he could stop at any time. Mahdi told Anderson that he was a commercial pilot, but that the other pilot, known to Mahdi only as "Ralph," had flown the plane. Mahdi also stated that he had met the plane in Louisiana and had received $500 for the trip. He offered to help Anderson break into the plane. He stated that he had left Montgomery Aviation to look for the other pilot, who he thought was going to rent a car. When Mahdi realized the rental agencies would be closed at that hour, he thought something was strange and started back to the airport.

Shortly before Mahdi was brought to Montgomery Aviation, Lieutenant L. M. Bradford of the Alabama Bureau of Investigation, arrived at the scene. Lt. Bradford received a description of the events surrounding the plane's landing from Ken Moseley. About ten minutes after Lt. Bradford arrived, William Rhegness and Jerry Ward, both ABI narcotics officers, also arrived. Lt. Bradford informed them of the circumstances of the plane's arrival, and sent them to check local motels. Before they left, they also learned from airport security that Mahdi had falsely stated the plane's owner, and that the plane had a Panther Conversion, which is a switch from three-bladed to four-bladed propellers designed to increase a plane's speed and capacity.

After Rhegness and Ward left, Sergeant Randall Brown of the Montgomery police came to lend assistance. Lt. Bradford described the circumstances of the plane's landing, and Brown then went to the office to call the cab companies to see if any had picked up fares at the airport. While on the phone, Brown saw a yellow taxi pull up to the gate at Montgomery Aviation. A white male got out and looked toward the plane and then toward Brown. He then got back into the cab and the cab left. Brown thought the man resembled the description he had received of the white pilot, and he went to his car and drove after the cab. He also radioed ahead for a marked unit to stop the cab.

Brown found the cab and a marked unit stopped along the road, and stopped by them. The cab driver got out and approached

Brown. The driver told Brown that he had picked up his fare at Howard Johnson's and that the man had told him he was going to meet a passenger coming from Nashville at midnight. The driver had proceeded to the main terminal, but after waiting briefly the passenger had directed him to Montgomery Aviation. When the cab stopped at the gate, the passenger got out, then got back in and said he was hungry and wished to return to the motel.

Brown then approached the cab and asked the passenger to get out. When he did, Brown patted him down, told him there was a problem at the airport, and asked him who he was and why he was at the airport. The passenger produced his driver's license, which identified him as William Willis. Willis stated that he had come to meet a friend from Nashville. He first stated the friend's name as John Jameson, and then changed the name to Johnson. Willis also stated that he planned to go to Mobile to play golf. Brown testified that he does not believe that he returned Willis' license at that time, although he apparently did within a very short time. He did not read Willis his *Miranda* rights. During the time Willis was stopped, three police cars were present, one of them a marked unit.

At this time, Rhegness and Ward arrived by the roadside. Brown and the cab driver informed them of the events leading up to the cab being stopped. Rhegness and Ward then approached Willis while Brown returned to his car. They asked Willis for his driver's license, which he produced. Rhegness then read Willis his *Miranda* rights, which Willis said he understood. Willis claimed that he was an independent coal broker alone on business. He stated that he planned to play in a golf tournament. Rhegness then asked Willis if he would stay with Brown, and Rhegness and Ward left for Howard Johnson's. Brown then told Willis that he would give Willis a ride to Howard Johnson's. Willis paid the cab driver, and then got into Brown's car. Willis rode up front and was not handcuffed.

Meanwhile, Rhegness and Ward had proceeded to Howard Johnson's, where they identified themselves to the clerk,

Elizabeth Lincoln, as police officers. They asked Lincoln if William Willis was a registered guest. When Lincoln began going through the hotel records, the officers asked to see them. Lincoln showed the officers the registration forms for three double rooms – Rooms 220, 222, and 224 – and also a long distance phone bill. She told them that Willis had paid cash. The officers then described the white pilot to Lincoln, and asked her if she had seen him. At some point during these events, defendant Newcomb had entered the lobby and asked Lincoln for change. She pointed him out to Rhegness and Ward.

The officers approached Newcomb, displayed their credentials, and asked him for identification. He gave his driver's license to Ward, who did not return it. They then asked Newcomb if he was a guest at the Motel, and he responded by producing a key to Room 220. Rhegness then read Newcomb his rights, and Newcomb stated that he understood. Newcomb stated that he did know who had rented the room, or who had given him the key. He claimed to be an unemployed aircraft salesman, and said he had driven to Montgomery with friends. He said he did not know who the friends were, and he did not know William Willis.

Ward then left the lobby and went out to his car. Outside he saw two men, Ron DeFranco and Harry Ziegler, coming from the restaurant. He asked them if they were staying at the motel, and in response, DeFranco produced a key to Room 224. He then asked them to come into the lobby, where he read DeFranco, Ziegler, and Newcomb their rights. All three responded that they understood. DeFranco and Ziegler stated that they did not know William Willis, and that they did not know how they got to Montgomery, where they came from, or with whom they came. The officers then asked all three to be seated and told them not to talk with one another. At about that time, Brown arrived with Willis. When asked if he knew Newcomb, DeFranco, and Ziegler, Willis stated that they were all his friends.

Sometime after Brown's arrival, Charles Park, an agent with

the Drug Enforcement Agency, came to the lobby. Park had received a call from Lt. Bradford at about 1:00 A.M. on August 4, and proceeded directly to Howard Johnson's. Upon his arrival, Park spoke with Rhegness, Ward, and Brown, who informed him of all the events up to that time. Park then informed the four defendants in the lobby that they were under arrest for possession of a controlled substance with intent to distribute.

Prior to Park's arrival, the other officers had ordered the suspects to empty their pockets onto the motel desk. After arresting the suspects, Park took their drivers' licenses and the keys to Rooms 220 and 224 from the desk, and told them to retrieve the rest of their property. Park noticed a set of car keys on the desk, which was retrieved by DeFranco. Park took the keys back from DeFranco, at which time DeFranco told him that the keys were for his Buick back home in Illinois. Park tried the keys in a maroon and grey Buick in the lot at Howard Johnson's, and found that they opened the door. He then tried the trunk. Inside, he found a suitcase-like container which he opened to find two night-vision devices. Park closed and replaced the container, closed the trunk, and returned to the motel.

At that point, Park realized that he had the keys to only two of the three rooms for which Willis had registered. He and Rhegness then went to Room 220 and knocked on the door. When nobody answered, Park let himself in and stepped inside to a point just past the bathroom. When he saw nobody, he left and repeated the procedure with Room 224. After leaving 224, Park went back inside that room and called Room 222. He told the person who answered that he was a police officer and that he wanted to talk. The person on the phone said alright. Park and Rhegness then knocked on the door to 222. Both had their guns drawn, but did not point them at the door. Cox opened the door. Park showed his credentials and asked to come in, and Cox said alright. Curry was in the room, and Park also noticed a cap with "Panther Conversion" lettered on it. Park asked Curry to whom the room was registered, and Curry pointed to Cox. Park then asked Cox, and he said it was registered to "Johnson." Park placed both under arrest.

Park then obtained a warrant to search the Piper Navajo. The search revealed that the duffel bags contained over 80 pounds of cocaine, with a street value of approximately $230,000,000. Park also had obtained a key from Willis' effects after they were viewed by the grand jury. He used it to open the baggage compartment in the nose of the plane, and he found that it contained a fuel tank. Park also learned that Nashville information had no listing for CIB Auto, and that the plane was registered to a Baltimore company. He further learned that DEA files listed the Navajo as belonging to a man who owned another plane that was to be seized for importing narcotics. On August 4, Park obtained a warrant for the arrest of all seven defendants.

On August 5, ABI Officer Jerry Hodges drove the maroon Buick to the ABI office, where he searched in acccordance with ABI's inventory procedures. Inside he found the container with the optic devices. A second Buick was towed to ABI from Howard Johnson's, and it also was searched pursuant to ABI's inventory procedures. Willis was later identified as having purchased the automobiles. Also on August 5, police officers entered Rooms 220, 222, and 224 without warrants, searched the rooms, and removed some luggage.

Beginning on September 21, this Court conducted an evidentiary hearing on defendants' suppression motions. In addition to the foregoing facts, both sides presented testimony bearing on the suppression issues involved in this case.

The Government presented testimony explaining the modus operandi of airborne drug smuggling operations. The federal and state narcotics agents testified that smugglers often use smaller, passenger planes, and will invariably land at night. The smugglers usually will draw the curtains on the plane. The off-load crew invariably will consist of people not from the immediate area who will be staying in nearby motels. Typically, smugglers will package marijuana in bales, quaaludes in clear plastic bags, and cocaine in duffel bags. Anderson, Bradford, and Ward were

familiar with a recent case in which a plane landed in Dothan, Alabama, carrying narcotics in duffel bags. Anderson did state, however, that he has seen duffel bags used to carry mail, fruit, and other items besides narcotics.

Defendants offered the testimony of Richard Newman, a flight line supervisor at Montgomery Aviation, and Charles Degan, an experienced pilot, both of whom testified that it is not unusual for duffel bags to be used for legitimate cargo. Degan further testified that passenger planes often are used for cargo. He added, on cross-examination, that the seats ordinarily are removed for a cargo flight. Degan also testified that it is not unusual for a Navajo to have a Panther Conversion. Finally, Degan testified that, because of the cost and sophistication of the equipment on board, his expectation of privacy in a plane would be very great.

Defendants also brought evidence that the plane had parked in a "tie-down" area, where the plane could easily be refueled and "tied down," or secured. Stettler, however, testified that he had never before had a pilot ignore his parking directions.

Finally, Elizabeth Lincoln, the desk clerk at Howard Johnson's, testified that ordinarily she would not show the motel's records to a person who asked to see them, nor would she tell somebody which rooms a person had registered. She also testified that police officers are an exception to this rule.

Defendants in this case have moved to suppress virtually all of the evidence that the various law enforcement agents obtained. Specifically, they have moved to suppress all statements made by all defendants to police officers, all physical evidence obtained from all defendants' persons, the motel records, any evidence seized from the motel rooms, any evidence seized from the automobiles, and any evidence seized from the plane. The Court will deal first with the arrests, and then with the other search and seizure issues.

I. *THE ARRESTS*

A. *"Crime Probable Cause"*

One issue that is common to all defendants is whether there was probable cause to believe a crime had been or was being committed. The standard for probable cause is well know.

> Probable cause to arrest exists where the facts and circumstances within the collective knowledge of the law enforcement officials, of which they had reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed.

United States v. Blasco, 702 F. 2d 1315, 1324 (11th Cir. 1983); *see United States v. Elsoffer*, 671 F. 2d 1294, 1298 (11th Cir. 1982). Thus, the standard is an objective one, and supports a "commonsense" approach to suppression questions. *See United States v. Thompson*, 712 F. 2d 1356, 1360 (11th Cir. 1983). Under this standard, the Court believes that the law enforcement officials had probable cause to believe a crime was being committed.

The circumstances of the plane's landing were such as to create considerable suspicion in a reasonable mind. The plane ignored Stettler's parking instructions, a circumstance which, given the enormous importance that safety procedures assume at airports, would create significant doubt in most minds. This is especially true where the plane ignored instructions to park in a lighted area in order to park in a dark area at night. The fact that the occupants left the curtains closed on every window but one also tends to exhibit an unusual interest in secrecy. Furthermore, the pilots left the area without any suggestion as to what was to be done with the plane, other than a fuel order and a statement that somebody might come by to unload in the morning. Defendants presented evidence that the plane parked in a "tie-down" area, but Stettler and Moseley were not given any instructions to tie the plane down.

The duffel bags also greatly add to the factual basis for probable cause. Although the Court does not doubt, as defendants assert, that duffel bags may be used to carry various cargoes other than narcotics, the presence of a large number of such bags on an expensive passenger plane that has landed under suspicious circumstances adds substantial weight to those suspicions. Although defendants presented expert testimony that passenger planes commonly carry cargo, their expert stated that--unlike the plane in question--the seats are usually removed.

The Court also believes that the officers' experience plays a role in their determination of probable cause. The circumstances of the plane's arrival clearly fit into the modus operandi of airborne drug smuggling operations, as testified to by the law enforcement officers from their experience in narcotics investigations. This testimony included the use of duffel bags in a passenger plane for smuggling narcotics in a recent case under the jurisdiction of Lt. Bradford who was in charge of the instant investigation. Defendants argue that officers' experience cannot be taken into account in determining whether probable cause existed, but the cases indicate otherwise. In two recent cases, the Eleventh and former Fifth Circuit examined the officers' experience as a factor in its determination. *United States v. Blasco*, 702 F. 2d 1315, 1325 (11th Cir. 1983); *United States v. Berry*, 670 F. 2d 583, 600-01 (5th Cir. Unit B 1982). Furthermore, the policeman's experience in drug investigations played a major role in the Court's decision in *Texas v. Brown*, 51 U.S.L.W. 4361 (U. S. April 19, 1983). In that case, the plurality opinion stated that "The distinctive character of the balloon itself spoke volumes as to its contents--particularly to the trained eye of the officer." *Id.* at 4365. To refuse to account for the experience and training of a police officer would be to expect every policeman to behave at all times as if it was his first day on the job.

This Court is aware that evidence of modus operandi is not in itself enough to establish probable cause. The Eleventh Circuit requires "some quantum of individualized suspicion." *United*

States v. Berry, supra, at 600 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976)). The Court believes such circumstances to be present in this case. Most important is the fact that the plane ignored Stettler's parking instructions. This combined with the occupants' departure from the area without any significant instructions about the plane, the covered windows, and the duffel bags would create significant doubts without regard to any knowledge of modus operandi. The latter is simply one more factor giving rise to probable cause. Defendants argue that these occurrences are consistent with innocent behavior. Each individually probably is; collectively, however, they give rise to a reasonable believe that the plane was involved in some illicit operation. The recited facts were sufficient to cause the employees of Montgomery Aviation Company to suspect strongly that a crime was being committed. They notified airport security who notified numerous law enforcement officers and officers of the Alabama Drug Enforcement Agency. These officers, on the basis of the recited facts, strongly suspected a crime was being committed and despite the near midnight hour took immediate steps to investigate the offense. This Court cannot say that their opinions on these facts were erroneous.

Although the arrest of Mahdi may have taken place before the law enforcement officers learned of the falsity of the statement by Mahdi as to the ownership of the plane on the fuel order form, this is a compelling fact supporting a finding of probable cause. None of the defendants in their exhaustive briefs makes any reference to the false information on the fuel order form.

Finally, Mahdi's statements to Anderson also strongly indicated that the plane contained contraband. In particular, Mahdi stated that he had been suckered and thought only mail was on the plane, and he offered to help Anderson break into the plane. Also, there is no evidence to show that Mahdi made these statements in response to a suggestion that the plane contained contraband. The Court notes that these statements may not contribute to the probable cause for Mahdi's arrest, because they occurred after it, but the Court finds that the police had "crime probable cause" even without these statements.

B. *"Offender Probable Cause" and Miranda Warnings*

1. *Mahdi*

There is little question that, once the police had probable cause to believe a crime had been committed, they also had probable cause to arrest Mahdi. Stettler saw Mahdi at the airport and then identified him along the road, thus clearly connecting him to the suspected crime.

Mahdi's arrest does, however, present potential Fifth Amendment problems. For incriminating statements made by a defendant during a custodial interrogation to be admissible, the defendant must first be advised of his rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966), to ensure that any waiver of the right against self-incrimination is voluntary. *United States v. Jonas*, 639 F. 2d 200 (5th Cir. 1981). Use of a four-factor test determines the occurrence of a custodial interrogation. The factors are "(1) whether probable cause to arrest had arisen; (2) whether the officer intended to hold the defendant; (3) whether the defendant believed that his freedom was significantly restricted; and (4) whether the investigation focused on the defendant." *Id.* at 203.

Despite the contrary contention of the Government, these factors persuade the Court that Trooper Dixon took Mahdi into custody when he picked up Mahdi on the highway. This Court has already found that probable cause to arrest existed. The Court also believes because of the circumstances of Dixon picking up Mahdi and placing him in the rear seat of the vehicle, the doors to which unlock only from the outside, that Dixon intended to hold Mahdi. Furthermore, it would have been the expectation of Mahdi that he could not leave. Finally, this Court finds that the investigation had focused on Mahdi.

The Court concludes that statements made by Mahdi to Dixon, though apparently routine and not incriminating, must be suppressed. There was no evidence at the hearing that Dixon advised Mahdi of his rights. There also was no evidence whether Mahdi made the statements prior to being taken into custody, or

in what context he made the statements. Thus, any such statements may not come into evidence.

The Court believes that Mahdi's statements to Anderson, however, are admissable. Anderson advised Mahdi of his rights, and Mahdi stated that he understood and affirmatively indicated his willingness to talk. Mahdi made one statement while Anderson was reading him his rights. Because the statement clearly was spontaneous and not in response to any question, it is admissible also as a voluntary statement. *United States v. Glen-Archila*, 677 F. 2d 809, 814-15 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 165 (1983).

2. *Willis*

The Court believes that there was sufficient probable cause to connect Willis to the suspected crime, and thus to arrest him. Sergeant Brown observed Willis look in the direction of the plane, which was surrounded by police officers, and then depart. Because Newcomb had told the linemen that somebody might come to unload the plane, and because Brown naturally would expect somebody to come to unload a plane Brown knew to be loaded with cargo, Brown logically would have been expecting somebody to arrive. Although the cab driver testified that he could not see the plane from where he sat, he also testified that Willis went around to the front of the cab. Furthermore, it is illogical to think that Willis would have decided to leave had he not seen anything, at least not without a more thorough inspection of the premises. Finally, Brown testified that Willis looked at the plane, and at him. Brown was talking on the telephone and his badge and pistol were in plain view of Willis, according to Brown's testimony. The relevant point of inquiry in determining probable cause is the state of the police officer's knowledge.

The cab driver's statements added to Brown's suspicions before Brown approached Willis. The cab driver stated that Willis had said he was going to meet a friend, and that Willis directed the driver to Montgomery Aviation after the driver first

went to the main terminal. After getting out briefly, Willis got back in, said he was hungry, and asked to leave. The only sensible conclusion that Brown could have reached was that Willis was alarmed by the sight of the plane surrounded by police officers and the sight of an officer talking on the phone. Willis contends that this evidence shows no more than that Willis came to meet a friend and then left after failing to find him. This explanation, however, is less logical than the Government's. It is unlikely that Willis would have left after such a cursory inspection of the grounds if he had come to meet a friend.

Willis' arrest does, however, present Fifth Amendment problems. As an initial matter, the Court does not agree with the Government's contention that Willis was not in custody when the cab was stopped and Willis was asked to get out. As the Court has stated, probable cause for taking Willis in custody existed. Although Brown testified that Willis was free to leave, the Court believes the facts indicate that Brown intended to hold Willis, and also that Willis would not reasonably have believed that he could leave. Once the police stopped the cab, Willis had no means of leaving. Furthermore, Brown appears to have held Willis' driver's license for at least a brief time, although the evidence shows that he returned it before Rhegness and Ward arrived. *Cf. United States v. Thompson*, 712 F. 2d 1356, 1359-60 (11th Cir. 1983) (Fourth Amendment context). Finally, Brown testified that he believed Willis to be connected to the plane, which also shows that the investigation had focused on Willis.

As a result, the Court believes that it must suppress all statements made by Willis to Brown along the highway, and not those made to Rhegness and Ward or those made at Howard Johnson's. Before Willis made any statements other than those made to Brown along the roadside, Rhegness read him his *Miranda* rights, which Willis said he understood. Willis argues that the initial failure to explain his rights taints the later statements, and cites *Stumes v. Solem*, 671 F. 2d 1150 (8th Cir. 1982). In that case, however, police intermittently questioned defendant over a period of two days after defendant stated that he would not talk

without first speaking to his attorney. Furthermore, the police knew that defendant's attorney had advised him to remain silent. The court concluded that defendant did not confess voluntarily. *Id.* at 1156-57. In the case at hand, Willis indicated no such unwillingness to talk. He appeared willing to talk both before and after being read his rights. Thus, the Court concludes that the initial, improper questioning by Brown which elicited no information not otherwise available, did not taint the later questioning.

3. *Newcomb*

The Court finds that there was sufficient probable cause to believe that Newcomb was connected to the suspected crime. Newcomb argues that the minor inconsistencies in the descriptions of him that the officers obtained show that the officers did not have probable cause to believe that Newcomb was the white male who exited the plane. The Court, however, does not fine this point significant. Rhegness and Ward had no reason to believe that the description they had received was inaccurate, and Elizabeth Lincoln, a neutral observer, pointed Newcomb out to them from that description. Furthermore, the officers learned immediately upon approaching Newcomb that he had the key to a room registered to Willis. Thus, the officers could reasonably believe that Newcomb was connected to the suspected crime. *See Shriner v. Wainwright*, No. 82-5469, at 5100-01 (11th Cir. Sept. 9, 1983).

The Court further finds that the officers did not violate Newcomb's Fifth Amendment rights. Prior to receiving his *Miranda* rights, Newcomb simply produced his driver's license and his room key. The Court finds that Newcomb was not in custody at that point. The only show of authority that the officers made was to display their credentials. Ward did apparently keep Newcomb's license, but Newcomb produced his room key immediately after producing his license. To hold that he was in custody on these facts would be to hold that the moment a policeman touches an individual's license that individual is in custody. Thus, the Court holds that all evidence obtained from Newcomb is admissible.

II. *THE MOTEL RECORDS*

The Court finds that defendants had no expectation of privacy in the motel records. The Supreme Court has held that an individual may not challenge the seizure of his business records from a third party. For instance, the Court has held that a person may not challenge the seizure of his bank records, *United States v. Miller*, 425 U. S. 435 (1976), or of his employment records. *Donaldson v. United States*, 400 U.S. 517 (1971). Thus, because the officers obtained the records from the motel, defendants have no expectation of privacy in the records.

Defendants argue that the business records cases are distinguishable, and that those cases only reach the situation where "an individual knowingly exposes his activities to third parties." *Reporters Comm. v. AT&T*, 593 F. 2d 1030, 1043 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979). The fact remains, however, that defendants did expose their activities to a third party–Howard Johnson's–when they registered at the motel. Defendants also argue that business records are distinguishable because a motel room is in effect a person's dwelling. Defendants point to the testimony of Elizabeth Lincoln, who stated that the motel would not disclose its records to anybody except policemen. Defendants further argue the motel "may not unilaterally make an exception to [its] policy [of nondisclosure] for law enforcement officials." However, in *Reporters Comm. v. AT&T*, the third party did exactly that. In that case, the court rejected plaintiff's Fourth Amendment challenge to AT&T's policy of disclosing billing records only to law enforcement officials. *Supra*, at 1038, 1042. This result extends to the instant case. Revealing the location of a person's room is not equivalent to allowing an invasion of the person's privacy within the room. If a person's mere location was such a private matter, then most people would not allow the listing of their addresses in the phone book. Consequently, the Court does not believe that any defendant had an expectation of privacy in the motel records.

III. *THE SEARCH OF THE MOTEL ROOMS*

The Court finds that any evidence seized as a result of the warrantless search of Rooms 220, 222, and 224 on August 5 must be suppressed. Certainly no exigent circumstances existed over one day after all the arrests. Furthermore, the occupants of the rooms have standing to challenge the searches. *See United States v. Bulman, supra.* Although the occupants of one room probably would not have standing to contest the search of another room, the Government had made not showing as to which items it seized from which room. Consequently, the Court believes that all evidence seized from the rooms must be suppressed on the present state of the record.

The Court also finds, however, that the Panther Conversion cap is admissible because it was discovered in plain view during a lawful arrest. The evidence at the hearing did not indicate whether the cap was seized during the arrests of Cox and Curry or during the later search of the rooms, or indeed whether the cap was ever seized. The most logical inference is that the cap was seized during the later search. Nevertheless, the Court finds the cap admissible under the "inevitable discovery" doctrine. This doctrine allows the admission of evidence "which would have been discovered regardless of any alleged unconstitutionality. "*United States vs. Roper*, 681 F.2d 1354, 1358 (11th Cir. 1982). The doctrine requires a reasonable probability that the evidence would have been discovered by legal means. *United States v. Brookins*, 614 F.2d 1037, 1048 (5th Cir. 1980). In the present case, the Court finds that the law enforcement officials actually discovered the cap by legal means, and the Court believes they eventually would have obtained a warrant to retrieve it.

The Court finds that Park and Rhegness had probable cause to arrest the occupants of Room 222. The officers knew that the occupants of the room were staying in a set of rooms rented by Willis and including a room occupied by the suspected pilot of the Navajo. Furthermore, the officers knew from experience that a drug smuggling ring would have an off-load crew staying at a

nearby motel. A reasonable person would logically conclude that Cox and Curry were part of that crew. The Court adds, without deciding, that Willis probably would have standing to challenge the entry into the room because he rented the room.

The Court also finds that exigent circumstances justified the officers' warrantless entry. This case is similar to *United States v. Roper, supra,* where the court held that exigent circumstances justified the police, who had arrested the defendant in the hall, in taking him back into his motel room, where they found incriminating evidence. The court relied on the facts that the defendant was arrested simultaneously with other defendants, that innocent guests were in the hall, and that the officers had not had time to secure the hallway. *Id.* at 1358-59. Although there was no evidence in this case that any specific bystanders were in danger, the officers had no opportunity to ensure the safety of any who might appear. Park and Rhegness had little opportunity to plan their actions, and also did not know how many people were in the room or whether any other conspirators were still at large. Furthermore, unlike the situation in *Roper,* Park and Rhegness had no knowledge of the identities of the rooms' occupants. Thus, if they placed the room under surveillance, any error would result in the permanent escape of the suspects.

In the alternative, the Court finds that Cox and Curry consented to the officers' entry. While the officers did have their guns drawn, neither had his pointed at the door or at Cox. Furthermore, Park asked to enter rather than demanding to do so. Even more significant, however, Cox or Curry consented to the entry over the telephone only moments before the officers actually entered. Although Cox still could have refused to permit the entry, the brief passage of time after a consent that was not obtained by any show of force convinces the Court that Cox's consent was voluntary at the time he allowed the officers to enter.

Because the arrests of Cox and Curry were legal, the Panther Conversion cap is admissible under the "plain view" doctrine.

That doctrine allows the admission of evidence discovered inadvertently during a lawful intrusion when it was apparent to the officer that the evidence was incriminating. *Texas v. Brown, supra*, at 4363. The evidence indicated that the cap was sitting in plain view, and Park did not know of its existence so the discovery was inadvertent. Finally, Park had been briefed about the plane and thus knew of its Panther Conversion. Thus, the Court finds the cap to be admissible.

IV. *THE AUTOMOBILES*

The Court finds that no defendant has shown standing to object to the search of either automobile. The proponent of a motion to suppress has the burden to establish standing under the Fourth Amendment. *Rakas v. Illinois*, 439 U.S. 128, 130 n. 1 (1978). "Legitimate expectations of privacy must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id.* at 143 n. 12. Thus, in *United States v. Bachner*, 706 F. 2d 1121, 1126 (11th Cir. 1983), the court inquired into whether the defendant "owned or leased" the aircraft or had "an unrestricted right of occupancy or custody or control."

The only evidence in this case tending to establish standing on the part of any defendant is the testimony of Park that Willis was identified as having paid for the cars. The Court does not believe this to be sufficient. The mere fact that Willis paid for the cars does not show that he owned them; in fact, there was some evidence at the hearing, albeit unclear, that Willis bought them for a corporation. Willis did not offer into evidence the cars' registration or any other evidence of their ownership, nor did he offer evidence that he paid for them with his own funds. He also offered no evidence that he had ever driven or ridden in either car. *See United States v. Glasgow*, 658 F. 2d 1036, 1044 (5th Cir. Unit B 1981). Consequently, the Court finds that no defendant has standing to challenge the search of the automobiles.

V. *THE AIRPLANE*

Finally, the Court finds that all evidence obtained from the plane is admissible. The Court does not believe any defendant has standing to challenge the search of the plane. The Court also finds the warrant to have been supported by sufficient probable cause.

As to standing, no defendant brought any evidence of a right to ownership or possession. The only possible evidence to support standing was the evidence indicating that Newcomb was the pilot and Mahdi a passenger. The mere fact that a person has flown a plane does not give him an expectation of privacy in it. *See United States v. Bachner, supra*, at 1126 n. 6. In *United States v. Glasgow*, the defendant had driven the van in question on at least two occasions, yet the court found him to lack standing. *Supra*, at 1044. Defendants did present testimony of an experienced pilot, who stated that he would have an expectation of privacy in a parked plane because of the value and sophistication of the equipment on board. The Court finds, however, that the value of the equipment does not give any defendant an expectation of privacy because none has brought evidence of a right to own or possess that equipment. The Court also finds that the sophistication of the equipment and the need to keep it safe does not give any defendant an expectation of privacy because there was no evidence that any defendant planned to return to the plane to use it. Thus, no defendant has a reasonable expectation of privacy in the plane.

Defendants argue, however, that they have standing to object to the use of illegally obtained statements in the affidavit for the warrant. *See Delaware v. Prouse*, 440 U. S. 648 (1979). Defendants thus argue that illegally obtained evidence cannot be used in support of a warrant, and without such evidence the warrant in this case fails. This approach, however, allows each individual defendant to object only to the use of evidence obtained from his own arrest. The evidence that the Court has found to have been seized illegally played an insignificant role in the probable cause for

the warrant. Even if the Court excluded all of the evidence challenged by any individual defendant, the affidavit still would be sufficient to support the warrant.

In fact, even if the Court excluded all evidence challenged by all defendants, the warrant would still be valid. The affidavit recounted the suspicious circumstances of the plane's arrival and the occupants' behavior, except that it omitted the fact that the plane ignored Stettler's parking instructions. The affidavit also recounted the fact that Mahdi falsely stated the plane's ownership. Nashville information had no listing for CIB Auto. The plane in fact was registered to a Baltimore company, and is listed on DEA files as belonging to a man who owns another plane that was to be seized for importing drugs. Thus, the Court finds the warrant to have been supported by more than sufficient cause.

Defendants additionally argue that, if the police officers used any illegally obtained evidence in the affidavit, the Court should invalidate the warrant. Defendants argue that this approach is necessary to prevent police officers from padding warrants with improper evidence, knowing that if the improper evidence is removed the proper evidence will remain with nothing lost. *See United States v. Nelson*, 459 F. 2d 884 (6th Cir. 1972). There might be some justification to this approach in a case involving flagrant and intentional misconduct by police officers, such as outright falsification in the affidavit. This case, however, presents no such circumstances.

Finally, defendants argue that the Court should invalidate the warrant because Agent Park did not distinguish adequately between those facts based on personal observation and those based on hearsay, thus preventing the magistrate from adequately judging the affidavit's reliability. The affidavit, however, recounts a large number of occurrences in several different places over a short period of time. The magistrate could not possibly have been misled into believing that Park actually observed all or even most of those occurences. Furthermore, the affidavit makes clear that the affiant did not observe the events surrounding the

plane's arrival, which the Court finds to be most significant in establishing probable cause. Thus, the Court finds all evidence seized from the plane to be admissible.

DONE this 13th day of October, 1983.

Truman Hobbs

UNITED STATES DISTRICT JUDGE